

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
:
DANYELL THOMAS, RASHAUN F. FRAZER, :
ANDRAE WHALEY, ELENI MIGLIS, CHERYL :
A. STRYCHARZ, and DANIELLE BROWN, :
individually and on behalf of all other employees
similarly situated,

Plaintiffs,

v.

Civil Action No. 16-cv-8160

BED BATH AND BEYOND, INC.

Defendant.

----- x
:
DECLARATION OF JONATHAN L. SULDS

I, Jonathan L. Sulds, an attorney admitted to the practice of law before the Courts of the State of New York and the United States District Court for the Southern District of New York, hereby declares under penalty of perjury the following:

1. I am an attorney and shareholder at the firm of Greenberg Traurig, LLP, attorneys for the Defendant Bed Bath and Beyond Inc. (“BBB”). I am over the age of 18 and am otherwise competent to testify to the matters contained in this Declaration.

2. All of the statements in this Declaration are true and accurate to the best of my knowledge.

3. A true and accurate copy of the Deposition transcript of Andrae Whaley is attached hereto as Exhibit 1.

4. A true and accurate copy of a document produced by opt-in Plaintiff Radica Kutwaru bearing bates number P00133RK is attached hereto as Exhibit 2.

5. A true and accurate copy of a document produced by opt-in Elizabeth Padilla bearing bates number P00032EP is attached hereto as Exhibit 3.

6. A true and accurate copy of the third amended complaint in the New Jersey Action captioned *Brent Carter, Robert Haynes, and Kenneth Cuoco, on behalf of themselves and all others similarly situated v. Bed Bath & Beyond, Inc.*, Docket No. MID-L-06178–16 (Sup. Ct. Law Div. Oct. 24, 2016) is attached hereto as Exhibit 4.

Dated: August 2, 2017.

/s/ Jonathan L. Sulds
Jonathan L. Sulds

EXHIBIT 1

*DANYELL THOMAS, ET AL. VS.
BED BATH AND BEYOND, INC.*

*ANDRAE WHALEY
July 19, 2017*



126 East 56th Street, Fifth Floor New York, New York 10022

P: 212-750-6434 F: 212-750-1097

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1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 DANYELL THOMAS, RASHAUN F. FRAZER,
4 ANDRAE WHALEY and ELENi MIGLIS,
5 individually and all other employees
6 similarly situated,

Plaintiffs,

-against-

7 BED BATH AND BEYOND, INC.,

8 Defendant.

9 Civil Action No. 16-cv-8160

-----x

11
12 200 Park Avenue
13 New York, New York

14 July 19, 2017
15 11:35 a.m.

16 Videotaped Deposition of ANDRAE WHALEY,
17 before Shari Cohen, a Notary Public of the State
18 of New York.

19
20
21
22
23 ELLEN GRAUER COURT REPORTING CO. LLC
24 126 East 56th Street, Fifth Floor
25 New York, New York 10022
212-750-6434
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1 A P P E A R A N C E S:

2

3 HANG & ASSOCIATES, PLLC

4 Attorneys for Plaintiffs

5 136-18 39th Avenue, Suite 1003

6 Flushing, New York 11354

7 BY: KELI LIU, ESQ.

8 PHONE 718-353-8588

9 EMAIL kliu@hanglaw.com

10

11

12 GREENBERG TRAURIG, LLP

13 Attorneys for Defendant

14 200 Park Avenue

15 New York, New York 10166

16 BY: JONATHAN L. SULDS, ESQ.

17 PHONE 212-801-6882

18 FAX 212-309-9582

19 EMAIL suldsj@gtlaw.com

20

21

22 ALSO PRESENT:

23 LAUREN ALVAREZ

24 KRISTIN THOMPSON

25

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(EXHIBITS TO BE PRODUCED)

S T I P U L A T I O N S

IT IS HEREBY STIPULATED AND AGREED by
and between the attorneys for the respective
parties herein, that the filing, and sealing
of the within deposition be waived.

IT IS FURTHER STIPULATED AND AGREED
that all objections, except as to the form of
the question, shall be reserved to the time
of the trial.

IT IS FURTHER STIPULATED AND AGREED
that the within deposition may be sworn to
and signed before any officer authorized to
administer an oath with the same force and
effect as if signed and sworn to before the
Court.

-oOo-

P R O C E E D I N G S

THE VIDEOGRAPHER: This is card one. We are now on the record at 11:37 a.m. on July 19, 2017. This is the opening of the deposition of Andrae Whaley in the matter of Danyell Thomas, et al., versus Bed Bath and Beyond, Inc.

This deposition is being held at the offices of Greenberg Traurig located at 200 Park Avenue, New York, New York 10166.

The court reporter is Shari Cohen with Ellen Grauer Court Reporting. I'm the legal videographer Nathaniel Armstrong also with Ellen Grauer Court Reporting.

Counsel please introduce themselves and state whom they represent.

MS. LIU: This is Keli Liu from Hang & Associates. I'm representing the plaintiffs.

MR. SULDS: On behalf of defendant Greenberg Traurig by

1 Jonathan L. Sulds, S-U-L-D-S.

2 THE VIDEOGRAPHER: Will the
3 court reporter please swear in the
4 witness.

5 A N D R A E W H A L E Y, called as a
6 witness, having been duly sworn by the
7 Notary Public, was examined and
8 testified as follows:

9
10 EXAMINATION BY

11 MR. SULDS:

12 Q. How are you, Mr. Whaley?

13 A. I'm all right.

14 Q. Did I pronounce that correctly?

15 A. Yes. You are one of the first
16 people.

17 Q. Excellent. I have a very
18 difficult to pronounce last name so I want to
19 make sure that I get that right.

20 A. Thank you.

21 Q. Have you ever had your
22 deposition taken before?

23 A. Regarding?

24 Q. Just in any kind of proceeding
25 have you sat in a room like this and had

1 WHALEY

2 testimony taken under oath?

3 A. No.

4 Q. Have you ever testified in a
5 court or regulatory agency of some kind?

6 A. No.

7 Q. Do you have an understanding
8 what the purpose of being here today is?

9 A. Yes.

10 Q. Tell me what you understand the
11 purpose to be?

12 A. It's about overtime pay.

13 Q. This is what lawyers call a
14 deposition. Have you heard that term before?

15 A. Yes.

16 Q. Do you know what a deposition
17 is?

18 A. Not really too clear on it.

19 Q. In a lawsuit both sides get an
20 opportunity to engage in what we call
21 discovery so that all the facts can come out
22 and the parties can understand better once
23 they are into the lawsuit what the strengths
24 and weaknesses of their positions are and in
25 the discovery process what happens is that

1 WHALEY

2 Bed Bath and Beyond as the defendant gets an
3 opportunity to ask questions of you and other
4 folks who are bringing this lawsuit under
5 oath for the purpose of getting your
6 testimony down, do you understand that?

7 A. Yes.

8 Q. Get a chance to ask you
9 questions in writing, those are called
10 interrogatories and gets a chance to ask you
11 to produce documents as well that might be in
12 your possession and which are relevant to the
13 lawsuit. Do you understand all that?

14 A. Yes.

15 Q. The important thing about a
16 deposition is for you to give the fullest and
17 most complete truthful answer that you can to
18 my questions. Do you understand?

19 A. Yes.

20 Q. If some time later on in this
21 lawsuit you testify in a way that's different
22 from what you say here today, I'll be
23 entitled to tell the judge look, he changed
24 his testimony or I'll be able to tell a jury
25 something like that. Do you understand that?

1 WHALEY

2 A. Yes.

3 Q. So if you do not understand a
4 question that I ask today, it's important for
5 you to say I don't understand it, okay?

6 A. Yes.

7 Q. If you don't understand the
8 question, I'll rephrase, all right. Now one
9 other thing that you need to do is you need
10 to verbalize your answer so we have a
11 videographer who is taking pictures of you,
12 could be a motion picture or a video, but
13 also this court reporter and if you don't say
14 yes or no and you just nod your head, she's
15 not going to be able to take that down so if
16 your answer is a yes, please say yes, if it's
17 a no please say no, okay?

18 A. Yes.

19 Q. Do you understand that?

20 A. I understand.

21 Q. Excellent. It's also important
22 that you give me your fullest and most
23 complete answer so, for example, if you say
24 yes, but there is an explanation to yes, this
25 is your chance to give it, do you understand?

1 WHALEY

2 A. I understand.

3 Q. Because later on if you say but
4 I wanted to explain that answer and you
5 didn't do it here, then I'll be able to say
6 to a judge or a jury well, he had a chance to
7 explain and he didn't do it then, okay?

8 A. I understand.

9 Q. Excellent. Do you have any
10 questions for me before we start?

11 A. No, I do not.

12 Q. One of the things that we try
13 and make sure of is that a witness who's in a
14 deposition is able to understand the
15 questions and answer them truthfully. Do you
16 have any reason you can think of as you sit
17 here now why you cannot understand the
18 questions I'm asking you?

19 A. No.

20 Q. Do you have any reason you can
21 think of why you can't answer those questions
22 truthfully?

23 A. No.

24 Q. Have you had any prescription
25 medication in the last 24 hours?

1 WHALEY

2 A. No.

3 Q. Have you done any non
4 prescription medication in the last 24 hours?

5 A. No.

6 Q. Have you had anything alcoholic
7 to drink within the last 24 hours?

8 A. No.

9 Q. Do you suffer from any medical
10 condition which would make it difficult for
11 you either to hear or understand these
12 questions I'm asking you?

13 A. No.

14 Q. Do you have any medical
15 condition which would interfere with your
16 ability to answer these questions truthfully?

17 A. No.

18 Q. Where are you currently
19 employed?

20 A. I'm at TJ Maxx.

21 Q. For how long have you been at
22 TJ Maxx?

23 A. I have been at TJ Maxx for
24 eight months.

25 Q. What job do you have at TJ

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WHALEY

Maxx?

A. I'm a manager.

Q. Is there a particular TJ Maxx store at which you are employed?

A. Yes.

Q. What store is that?

A. The store located on 57th Street and Eighth Avenue.

Q. 57th and?

A. 57th and Eighth Avenue.

Q. Prior to being employed by TJ Maxx, where were you employed?

A. I was at Forever 21 prior to that.

Q. For how long were you at Forever 21?

A. I was there for about four months.

Q. What was your job at Forever 21?

A. I was a manager there as well.

Q. As a manager at Forever 21, did you receive overtime?

MS. LIU: Objection.

WHALEY

A. Yes.

Q. As a manager at TJ Maxx, are you paid overtime?

A. No.

Q. Do you work over 40 hours a week at TJ Maxx?

A. No.

Q. Before you worked at Forever 21, where did you work?

A. I worked at Bed Bath and Beyond.

Q. What were the dates of your employment at Bed Bath and Beyond?

A. From July -- you want the actual date?

Q. As best as you can recall?

A. From July of 2011 to July of 2016.

Q. How did you come to leave Bed Bath and Beyond's employ?

A. I left Bed Bath and Beyond to seek opportunity at Forever 21.

Q. Did you voluntarily resign from Bed Bath?

1 WHALEY

2 A. Yes, I did.

3 Q. Before you worked at Bed Bath
4 and Beyond, where did you work?

5 A. I worked at Toys R Us.

6 Q. For how long did you work at
7 Toys R Us?

8 A. I would say about a year and --
9 I believe it was about a year and ten months
10 or a year and ten months.

11 Q. What was your job at Toys R Us?

12 A. I was a manager at Toys R Us as
13 well.

14 Q. Were you any specific kind of
15 manager as well?

16 A. I was an assistant store
17 manager and I was in charge of operations.

18 Q. Did you work over 40 hours a
19 week at Toys R Us?

20 A. Yes.

21 Q. Did you receive overtime for
22 the hours over 40?

23 A. No.

24 Q. Have you brought a lawsuit
25 against Toys R Us?

1 WHALEY

2 A. No.

3 Q. Did you ever complain about
4 your pay at Toys R Us?

5 MS. LIU: Objection.

6 Q. You can go ahead.

7 A. No.

8 Q. Prior to working at Toys R Us,
9 where did you work?

10 A. I worked at Circuit City.

11 Q. What were the years
12 approximately you were at Circuit City?

13 A. I believe it was 2002. I can't
14 remember the first year I started at Circuit
15 City.

16 Q. For how long did you work at
17 Circuit City?

18 A. I stayed there until it closed
19 down at the year of I believe it was 2009 of
20 April.

21 Q. Did you have a manager's role
22 at Circuit City at any point in that tenure
23 there?

24 A. Yes, I did.

25 Q. What was the manager's role?

1 WHALEY

2 MS. LIU: Objection.

3 A. I don't understand the
4 question. What do you mean?

5 Q. What was the job you had as a
6 manager at Circuit City?

7 A. At Circuit City I was an
8 assistant store manager as well as I was a
9 district operations manager later on.

10 Q. When you worked as an assistant
11 store manager at Circuit City, did you work
12 over 40 hours a week at any point?

13 A. Yes.

14 Q. Did you receive overtime for
15 those hours over 40?

16 MS. LIU: Objection.

17 A. No.

18 Q. When you worked as a district
19 operations manager at Circuit City, did you
20 work over 40 hours in any week?

21 A. Yes.

22 Q. Did you receive overtime
23 payment for those hours over 40?

24 A. No.

25 Q. Did you ever complain to

1 WHALEY

2 Circuit City that you were not properly paid?

3 MS. LIU: Objection.

4 A. No.

5 Q. Did you bring a lawsuit against
6 Circuit City?

7 A. Sorry?

8 Q. Did you bring any lawsuits
9 against Circuit City?

10 A. No.

11 Q. What's your educational
12 background?

13 A. College graduation from Long
14 Island University.

15 Q. What year?

16 A. 2000 -- I can't remember the
17 year I graduated. I'm sorry.

18 Q. Would it have been 2009?

19 A. Yes.

20 Q. Do you have a BA from them?

21 A. Yes.

22 Q. In what field?

23 A. Education.

24 Q. Any part of your degree have to
25 do with history?

1 WHALEY

2 A. Yes.

3 Q. Be fair to say as a graduate
4 with a degree in education that you read
5 documents before you sign them?

6 MS. LIU: Objection.

7 A. I don't understand.

8 Q. When you are asked to sign a
9 document, do you read it before you sign it?

10 MS. LIU: Objection.

11 MR. SULDS: What's the grounds
12 of the objection?

13 MS. LIU: Leading.

14 MR. SULDS: This is a
15 deposition. Okay.

16 Q. You can go ahead and --

17 A. I'm sorry. Repeat the question
18 one more time, please?

19 MR. SULDS: Would you read the
20 question back, please.

21 (Record read.)

22 A. I ask questions before I sign
23 it.

24 Q. So do you remember signing a
25 declaration in this case?

1 WHALEY

2 A. Yes.

3 MR. SULDS: Let's make this
4 Whaley 1.

5 (Defendant's Exhibit Whaley 1,
6 Declaration, marked for
7 Identification.)

8 Q. You have got a document in
9 front of you which is Exhibit 1. Do you
10 recognize that document?

11 A. Yes, I do.

12 Q. If you will take a look at the
13 last page, it looks like page 7, did you sign
14 that document?

15 A. Yes, I did.

16 Q. Did you read this document
17 before you signed it?

18 A. Yes, I did.

19 Q. Did you write this document?

20 MS. LIU: Objection.

21 A. I did not write this document.
22 I spoke to my lawyer --

23 MS. LIU: Objection.

24 Q. So one of the things that I'm
25 not allowed to ask you about are

1 WHALEY

2 conversations with your lawyer that's covered
3 by the attorney/client privilege.

4 A. Correct.

5 Q. So I'm not interested in what
6 you said to your lawyer and what your lawyer
7 said to you, but I can ask you questions
8 about how the document came to be created.

9 A. Okay, sure.

10 Q. So I think it's sufficient for
11 my purposes right now that you read this
12 document?

13 A. I read this document.

14 Q. And you signed it, correct?

15 A. I signed the document, yes.

16 Q. Did you know that you were
17 signing this under penalty of perjury?

18 A. Yes.

19 Q. Do you know that the oath you
20 swore here today is to tell the truth under
21 penalty of perjury?

22 A. Correct.

23 Q. Tell me if you would, please,
24 about how you came to be employed at Bed Bath
25 and Beyond?

1 WHALEY

2 A. At the time I had a friend that
3 worked there. He told me about the job.

4 Q. Who was the friend?

5 A. His name is Jose. I don't
6 recall his last name.

7 Q. Okay.

8 A. He was a department manager at
9 that time and I filled out an application and
10 Francis McKinley contacted me.

11 Q. Hold on one second. Where did
12 you get an application?

13 A. From the actual store.

14 Q. So you went to the store?

15 A. Yes.

16 Q. Which store?

17 A. 18th Street.

18 Q. Do you know if that store had a
19 number?

20 A. Yes, store 42.

21 Q. So you went to store 42 on 18th
22 Street and obtained an application?

23 A. Yes.

24 Q. You filled out the application?

25 A. Yes.

1 WHALEY

2 Q. Did you fill it out on the day
3 that you were at store 42?

4 A. Yes.

5 Q. Did you fill it out there at
6 the store?

7 A. I filled it out at the store.

8 Q. So describe what happened that
9 day?

10 A. That was it. I went to the
11 store, filled out an application, submitted
12 it to one of the department managers there
13 and I left.

14 Q. Where did you go within the
15 store to get the application?

16 A. Customer service area.

17 Q. To whom did you give the
18 application once you had finished filling it
19 out?

20 A. That I don't recall.

21 Q. What happened next in that
22 process?

23 A. I think a couple of days later
24 Francis McKinley called me up. We had a
25 conversation over the phone.

1 WHALEY

2 Q. Who is Francis McKinley?

3 A. At that time I think she was a
4 recruiter if I'm not mistaken.

5 Q. For Bed Bath?

6 A. For Bed Bath and Beyond.

7 Q. And do you remember the
8 conversation that you had with her?

9 A. Real quick conversation just
10 about where I worked at and just my
11 experience as a manager.

12 Q. What happened next?

13 A. She called me back. Then after
14 that I met her. She set me up for an
15 interview and I spoke to her while she
16 interviewed me basically about the same
17 things that we spoke about over the phone.

18 Q. So let me make sure I got this
19 right. You went to store 42, got an
20 application, filled it out, gave it to
21 somebody at the store. Francis McKinley
22 called you, talked to you on the phone.
23 Short time later, couple of days, whatever,
24 she called you back and what happened in that
25 second phone call?

1 WHALEY

2 A. She just said come in for an
3 interview. Excuse me, she would like me to
4 come in for an interview.

5 Q. Where were you supposed to come
6 in?

7 A. I came in at 18th Street.

8 Q. Were you supposed to ask for
9 someone in particular?

10 A. Yes, I was supposed to ask for
11 Francis McKinley.

12 Q. Did you do that?

13 A. Yes, I did.

14 Q. So please describe as best as
15 you can now recall what that process was?

16 A. We spoke about my background as
17 a manager as I stated. Then she told me
18 about the Bed Bath and Beyond culture. That
19 was pretty much about it.

20 Q. Was there any discussion at
21 that point about what job you were seeking?

22 A. At that point it was a
23 department manager job.

24 Q. How did you know that?

25 A. She told me it was a department

1 WHALEY

2 manager job.

3 Q. How much did that job pay?

4 A. We did not discuss that.

5 Q. Why?

6 A. That was not brought up.

7 Q. Why didn't you ask?

8 A. Wasn't something that was asked
9 for me to ask so I didn't ask the question.

10 Q. On the day that you went in and
11 spoke with Francis McKinley, did you speak to
12 anybody else?

13 A. The same day?

14 Q. The same day?

15 A. No.

16 Q. How was it left after that
17 interview?

18 A. She said that she will pass on
19 the information from what me and her spoke
20 about to I believe another manager.

21 Q. Where did that interview take
22 place in the store physically?

23 A. She had an office. It was in
24 the office.

25 Q. What time of day was it?

1 WHALEY

2 A. It was day time. I can't give
3 you exact time.

4 Q. How long did that last?

5 A. Probably about 25 to 30
6 minutes.

7 Q. Did you ask any questions
8 during the interview?

9 A. Yes, I did.

10 Q. What questions did you ask?

11 A. I just asked about the culture
12 of the company, the type of like standards
13 that they had, operational procedures.

14 Q. Did you ask about the hours?

15 A. No, I did not.

16 Q. Did it matter to you whether it
17 would be a night shift or a day shift that
18 you would be hired for or at least being
19 interviewed for?

20 A. No, it did not.

21 Q. Did you ask what the duties and
22 responsibilities would be for the job for
23 which you were being interviewed?

24 A. Yes.

25 Q. What were you told?

1 WHALEY

2 A. She said that you would be a
3 department manager and so I never heard of
4 the term actually department manager. I was
5 told that everyone who comes into Bed Bath
6 and Beyond starts as a department manager and
7 you lead your own team.

8 Q. Was there a particular
9 department for which you were being
10 interviewed?

11 A. No.

12 Q. Then what happened next in this
13 interviewing process?

14 A. The same day or --

15 Q. Just what was the next step
16 either that day or the next day or whatever?

17 A. I would say probably like a
18 week later she called me and said she was
19 going to set me up for another interview with
20 a store manager on the west side.

21 Q. Did that happen; were you set
22 up for an interview?

23 A. Yes, I was.

24 Q. Where on the west side was that
25 store?

1 WHALEY

2 A. I have a store number, but I
3 can't remember the address.

4 Q. I'll take the store number?

5 A. 565.

6 Q. Did you go to 565 for that
7 interview?

8 A. Yes, I did.

9 Q. Was that about a week or so
10 later?

11 A. About a week or so.

12 Q. Was there any interchange
13 between you and Bed Bath in that interim
14 between the time that you saw Ms. McKinley at
15 store 42 and the time you went to 565?

16 A. No.

17 Q. Who was the person that you
18 went to interview with at 565?

19 A. His name was Dennis. I don't
20 recall his last name.

21 Q. Do you recall what job he had?

22 A. He was a store manager.

23 Q. You met him at 565?

24 A. Yes.

25 Q. Was there a space within 565

1 WHALEY

2 where you had your interview?

3 A. His office.

4 Q. Do you remember what time of
5 day?

6 A. Day time.

7 Q. Was anybody else present?

8 A. No.

9 Q. How long did that interview
10 take?

11 A. About the same time period 20,
12 25 minutes.

13 Q. What did you two talk about?

14 A. The same thing that we spoke
15 about with Francis, just about my background,
16 the culture of Bed Bath and Beyond. I asked
17 the same questions again about the operations
18 and procedures. That was it.

19 Q. Approximately how much were you
20 earning at Toys R Us at that time?

21 A. At the time I left?

22 Q. At the time you -- let me start
23 back. At the time you were interviewing with
24 Bed Bath, were you then employed at Toys R
25 Us?

1 WHALEY

2 A. Yes.

3 Q. Approximately how much were you
4 earning?

5 A. I was making at that time maybe
6 65,000, 66,000 if I'm not mistaken.

7 Q. You were not making overtime;
8 is that correct?

9 A. No.

10 Q. You were not working over 40
11 hours a week?

12 A. In Toys R Us, yes, I think we
13 did 45 hours a week. We were not paid hourly
14 though.

15 Q. In this interview with Dennis
16 at 565, did you talk about salary or hourly
17 wage?

18 A. No, he didn't ask that
19 question.

20 Q. Did you ask that question?

21 A. No.

22 Q. Why not?

23 A. Wasn't a question that he asked
24 and wasn't a question that I even asked.

25 Q. Did you talk about the hours

1 WHALEY

2 that you might be required to work in the
3 job?

4 A. No.

5 Q. How did that interview end?

6 A. He said that he has to speak
7 back to Francis and then he will -- I should
8 get a phone call or I would receive a phone
9 call, excuse me, after he partners up with
10 Francis.

11 Q. What happened next in this
12 process?

13 A. The next process Francis called
14 me a couple of weeks later and she set up
15 another interview with Kevin, the district
16 manager of Bed Bath and Beyond in Manhattan.

17 Q. What part of the year was it
18 that you were doing this interviewing at Bed
19 Bath?

20 A. I would say that was in June.
21 Yeah, it was mid June.

22 Q. Was there an interview that was
23 set up with Kevin?

24 A. Yes, there was.

25 Q. Where was that interview held?

1 WHALEY

2 A. That was at store 361.

3 Q. Where within store 361 if you
4 recall?

5 A. In an office.

6 Q. Anybody else present?

7 A. No.

8 Q. What do you recall saying to
9 Kevin and Kevin saying to you in that
10 interview?

11 A. Same questions asked about the
12 culture of the company, policies, operations.
13 He spoke about customer service and he asked
14 about my salary.

15 Q. Do you recall the words that he
16 used?

17 A. He said how much -- he said
18 what are you making at Toys R Us.

19 Q. What did you tell him?

20 A. I told him the amount I was
21 making which was 65 or 66,000 at that time.

22 Q. What if anything did he say in
23 response?

24 A. No response.

25 Q. Did you ask him at that point

1 WHALEY

2 how much the job for which you were
3 interviewing paid?

4 A. No.

5 Q. Why?

6 A. It wasn't a question I decided
7 to ask.

8 Q. Why not?

9 A. That's just not what I normally
10 do in an interview unless I feel I need to
11 ask the question I ask it, but I didn't ask.

12 Q. You didn't know after three
13 interviews whether the job was going to pay
14 you 40,000 or 50,000?

15 A. No.

16 Q. And you didn't know how many
17 hours there were that you were going to work?

18 A. No.

19 Q. And you didn't know whether you
20 would be eligible for overtime or not?

21 A. No.

22 Q. And you didn't know what
23 department there was for which you might be
24 hired?

25 A. No.

1 WHALEY

2 Q. You asked about the culture and
3 policies in each of these three interviews
4 that you had?

5 A. Yes.

6 Q. Explain if you will please why
7 you didn't ask about salary?

8 A. That's just a question I didn't
9 decide to ask.

10 Q. How much time would you say you
11 had spent on interviewing up to the time that
12 you were with Kevin including that interview?

13 A. I don't understand that
14 question.

15 Q. If you were to take a look back
16 the time it took you to put in your
17 application, have the two telephone calls
18 with Francis, have the meeting with Francis,
19 have the meeting with Kevin and have the next
20 meeting, how much time was involved all
21 together?

22 A. I understand what you are
23 saying. I understand about three or four
24 weeks.

25 Q. How much of your time; was it a

1 WHALEY

2 couple of hours, was it ten hours? You
3 personally, how much time had you put into
4 all this?

5 A. Maybe a couple of hours.

6 Q. What I don't understand and
7 perhaps it's just me is why you would put a
8 couple of hours of your time in on a job
9 where you didn't know what you were going to
10 be paid. Can you explain that?

11 MS. LIU: Objection.

12 A. Repeat the question again. I'm
13 sorry.

14 Q. What I don't understand and I
15 hope you will explain for me is why you would
16 take a couple hours of your time interviewing
17 on a job where you didn't know what you were
18 going to be paid?

19 A. Again, that just wasn't a
20 question that I asked.

21 Q. How did the interview end?

22 A. He said that he will partner up
23 with Francis and they will get back to me at
24 a later time.

25 Q. Did they get back to you at a

1 WHALEY

2 later time?

3 A. Yes.

4 Q. Who got back to you?

5 A. Francis did.

6 Q. Was that in person or --

7 A. No, it was over the phone.

8 Q. In that telephone call what did
9 she say to you and what did you say to her?

10 A. She said Andrae, I have an
11 offer for you. She said it's a department
12 manager position at Bed Bath and Beyond, the
13 18th Street store. Then after that she told
14 me the salary.

15 Q. What did she say the salary
16 was?

17 A. I think at that time I think it
18 was 63,000 at that time.

19 Q. What did she say about the
20 hours you would work?

21 A. She said that you have to do 47
22 -- she said it's an hourly position. You
23 have to do 47.5 hours so she told me that the
24 first 40 hours is your regular hourly rate
25 and then after that whatever you do after

1 WHALEY

2 that it's time-and-a-half overtime or
3 whatever you call it overtime after that so
4 she broke it down. She said you take -- I'll
5 give an example because I can't remember the
6 dollar amount at the time. She said let's
7 say it was \$30, times that by 40, then you
8 take the \$30 and you times it by half of that
9 so then she goes and you take that and then
10 she goes the additional 7 hours, the 7.5
11 hours of overtime gets you into your salary.

12 Q. What else if anything did you
13 talk about in that call?

14 A. She talked to me about the
15 benefits. She talked to me about the
16 opportunities of growth. That was it.

17 Q. Did you talk in that call about
18 the hours each day that you would work, what
19 your shift would be?

20 A. No.

21 Q. Did you ask?

22 A. No.

23 Q. What shift were you then
24 working or what hours were you then working
25 at Toys R Us?

1 WHALEY

2 A. Shift?

3 Q. Yeah, when I say shift, I'm
4 thinking did you start at nine in the
5 morning, did you start at three in the
6 afternoon, did you start at 11 at night?

7 A. At Toys R Us I pretty much
8 worked 6 to 3.

9 Q. Six p.m.?

10 A. Excuse me, six a.m. to three
11 p.m.

12 Q. If I call that shift just for
13 both of us to understand?

14 A. Okay.

15 Q. There was no conversation if I
16 understand your testimony about the shift you
17 would work at Bed Bath and Beyond when she
18 and you talked about the offer?

19 A. No.

20 Q. You didn't know at that point
21 whether you were being asked to come in at
22 midnight for example?

23 A. No.

24 Q. Or being asked to come in at
25 four a.m. for example?

1 WHALEY

2 A. No.

3 Q. Did you accept the job at that
4 time?

5 A. I did.

6 Q. I'm sorry?

7 A. I did.

8 Q. What happened next after that
9 phone call?

10 A. After that phone call about two
11 weeks later I had my first -- she gave me my
12 day one schedule which was the first day of
13 orientation.

14 Q. Did she give you the schedule
15 for orientation during that call or
16 subsequently?

17 A. Subsequently. It was like -- I
18 think it was like a week before I started.

19 Q. How did she communicate that
20 schedule to you?

21 A. Over the phone.

22 Q. In that telephone call was
23 there any conversation about anything other
24 than the schedule?

25 A. No.

1 WHALEY

2 Q. How long did that call take?

3 A. Two minutes.

4 Q. Where was the orientation to
5 be?

6 A. At 18th Street and Sixth
7 Avenue.

8 Q. Do I understand correctly that
9 on the day that you were scheduled for
10 orientation you went to the 18th Street
11 store?

12 A. Yes, I did.

13 Q. Did you have orientation there?

14 A. Yes, I did.

15 Q. What was involved in the
16 orientation?

17 A. Orientation you meet a lot of
18 people so met a lot of people. They started
19 probably around eight a.m. so you had to
20 dress casual. You were in a room with some
21 other department managers, some part-time
22 associates as well.

23 Q. What were the subjects that
24 were gone over in the orientation?

25 A. Anything from scheduling,

1 WHALEY

2 policies and procedures, dress code, conduct,
3 culture, safety. That's about it that I
4 could recall.

5 Q. Were there new hire paperwork
6 that you had to fill out?

7 A. Yes, there was new hire
8 paperwork.

9 Q. When did you fill that out?

10 A. We filled that out orientation
11 day.

12 Q. You read all the things you
13 were asked to sign?

14 A. Yes, new hire paperwork, yes.

15 Q. Asked whatever questions you
16 had about what you were given to sign?

17 A. Yes.

18 Q. How long did the orientation
19 take?

20 A. Nine hours or so.

21 Q. All on that day?

22 A. I'm not understanding your
23 question.

24 Q. Was it nine hours in one day or
25 did it go from one day to the next?

1 WHALEY

2 A. It went from one day to the
3 next.

4 Q. How many days in total was the
5 orientation?

6 A. I don't recall how many days.
7 We did work five days that week. I don't
8 recall how many days of orientation it was.
9 Might have been two or three days.

10 Q. Then once you had finished the
11 orientation what happened? Were you put to
12 work; did you come back the next day to go to
13 work?

14 A. After day one or once we
15 finished the orientation process?

16 Q. If I understood your testimony
17 correctly and please tell me if this is right
18 or wrong, you went to the store, you had
19 orientation and that was in the form of
20 classes essentially?

21 A. Yes.

22 Q. You were in a room, somebody
23 came in and talked to you about policies and
24 procedures and that sort of thing?

25 A. Yes.

1 WHALEY

2 Q. There were other people there
3 who were being oriented at the same time?

4 A. Yes.

5 Q. That process that I'll call it
6 the classroom process that may have lasted
7 more than one day from what you recall?

8 A. Correct.

9 Q. You don't recall whether it was
10 two days or three days or whatever; is that
11 right?

12 A. Correct.

13 Q. What I'm asking is you is when
14 those classes finished, when that orientation
15 finished, on that day that it finished, did
16 you then start working in the store?

17 A. Yes.

18 Q. What job did you start working
19 at?

20 A. Department manager. At that
21 time they had me in the bedding section.

22 Q. What were the hours you were to
23 work each day?

24 A. Ten-and-a-half.

25 Q. From when to when?

1 WHALEY

2 A. It required at that time I
3 would say I think it was three opening shift
4 which was from 7 a.m. to 5:30, one mid shift
5 from ten a.m. to 8:30, one closing shift,
6 excuse me, from one to 11:30. One p.m. to
7 11:30 p.m.

8 Q. Do you recall which shift you
9 started working on?

10 A. No, not when I originally
11 started in the department, but like I said,
12 it was a 7 a.m. to 5:30. I had three days of
13 opening, one day mid, one day close.

14 Q. So do I understand correctly
15 that throughout your workweek the time that
16 you started varied from day-to-day?

17 MS. LIU: Objection.

18 A. I don't understand the question
19 you're asking.

20 Q. If I heard you correctly, what
21 you said was that you a couple of days came
22 in at seven; is that right?

23 A. Seven a.m.

24 Q. A couple of days you came in
25 for the mid shift?

1 WHALEY

2 A. Yes.

3 Q. And perhaps during the week you
4 might also do the closing shift?

5 A. Correct.

6 Q. Was there any pattern to how
7 many opening, how many mid shifts and how
8 many closing shifts you had in any given
9 week?

10 A. Pattern like I said it was
11 three days opening, one mid, one close and
12 that could change depending on the needs of
13 the business.

14 Q. When you first started were you
15 just on your own or was there someone there
16 to see what you were doing and help you
17 along?

18 A. Yeah, there were other
19 department managers.

20 Q. Did you shadow anyone?

21 A. A department manager, yeah.

22 Q. When I use the term shadow,
23 what do you understand me to be saying?

24 A. Was I being trained by
25 somebody.

1 WHALEY

2 Q. There was another department
3 manager who was there?

4 A. Yes.

5 Q. For how long did that shadowing
6 process go on?

7 A. The shadowing process goes on a
8 long time. The training at that time you
9 train for about maybe like two months.

10 Q. Then what happened?

11 A. As far as what?

12 Q. Then what happened; did the
13 training cease and you were sort of on your
14 own?

15 A. Yes.

16 Q. Was the first part of your
17 employment the training shadowing, that was
18 all within bedding or no?

19 A. No. You have to learn the
20 culture of the business so you are going to
21 do some training at the front end, do some
22 training in the back of the house which is
23 maintenance, you are going to do training
24 everywhere.

25 Q. How many other department

1 WHALEY

2 managers were there at that -- what's the
3 number of the store?

4 A. Store 42.

5 Q. Did you ever work at any other
6 store for Bed Bath?

7 A. Yes.

8 Q. Which other store?

9 A. I don't know the store number.

10 Q. What was the other store?

11 A. A store in Long Island.

12 Q. What were the dates you worked
13 approximately at store 42?

14 A. The time period or dates?

15 Q. Yes.

16 A. From 2011 of July to 2016 of
17 July.

18 Q. When did you work at the store
19 on Long Island?

20 A. They needed me to go to Long
21 Island, I can't remember the year correctly.
22 I think it was 2014.

23 Q. For how long were you at that
24 store in Long Island?

25 A. About a month.

1 WHALEY

2 Q. Any other stores at which you
3 worked while you were at Bed Bath?

4 A. Yes.

5 Q. Where?

6 A. 361 and 565.

7 Q. What were the dates
8 approximately the time frame that you worked
9 at 361?

10 A. Let's say 2012 we did a couple
11 of over nights over there and 565 we did a
12 couple of over nights as well.

13 Q. Also in 2012?

14 A. Yes.

15 Q. What does it mean to say over
16 nights?

17 A. Overnight we assisted in doing
18 inventory for the two stores.

19 Q. What was the nature of the work
20 you did at the Long Island store?

21 A. Anything as far as stocking
22 with the associates, maintenance, sweeping,
23 cashiering, ringing customers up.

24 Q. Were you a department manager
25 at the Long Island store?

1 WHALEY

2 A. Yes, I was a department manager
3 at the Long Island store.

4 Q. If I heard you correctly, it
5 seems like you could say 42 was your home
6 store?

7 A. Correct.

8 Q. You had a couple of assignments
9 at 361 and 365 for a couple of overnights
10 each; is that right?

11 A. That's right.

12 Q. And the one month in the Long
13 Island store?

14 A. Correct.

15 Q. Coming back to 42, how many
16 other department managers were there who
17 worked at 42 in a normal workweek?

18 A. Probably over 30 department
19 managers.

20 Q. In terms of the way the store
21 was organized, were there hourly sales
22 associates who worked with department
23 managers?

24 A. Yes, there were.

25 Q. How many hourly sales

1 WHALEY

2 associates were there in a normal workweek at
3 store 42?

4 A. I can't recall that number, but
5 if I would say in the normal workweek we have
6 over 400 associates.

7 Q. So if I were trying to get a
8 snapshot of store 42 during the time you were
9 there, would it be accurate to say
10 approximately 400 hourly associates, right?

11 A. Yes.

12 Q. Approximately 30 department
13 managers?

14 A. Yes.

15 Q. Did the department managers
16 report to someone?

17 A. The department managers?

18 Q. Yes.

19 A. Yes, we reported to senior
20 managers, store manager.

21 Q. The term senior managers, was
22 there a job called assistant store manager as
23 well?

24 A. Yes, there was a job, excuse
25 me, so yes, let me be a little more detailed

1 WHALEY

2 with that. Senior manager and assistant store
3 manager.

4 Q. Same job?

5 A. Same job.

6 Q. How many assistant store
7 managers or senior managers in a typical week
8 on the payroll there at 42?

9 A. Six to seven.

10 Q. Was there also a store manager?

11 A. Yes, there was a store manager.

12 Q. Just one store manager?

13 A. One store manager.

14 Q. Who was the store manager at 42
15 when you first started there?

16 A. Kristin Thompson.

17 Q. Was she the store manager
18 throughout the time you were at store 42?

19 A. Yes, she was.

20 Q. Who were the senior managers at
21 the time you started at store 42?

22 A. You had Jerry, he was one
23 senior store manager. I can't remember
24 everyone's last name.

25 Q. Okay.

1 WHALEY

2 A. Jerry, senior ASM assistant
3 store manager, Frank ASM, Neil, an ASM. I
4 cannot spell this person's name, never could,
5 Rajid, an ASM, Alex, an ASM, Art, an ASM,
6 Nikki Dillworth, an ASM. Neary, an ASM.

7 Q. Did the cast of ASMs or store
8 managers change during the time you were at
9 store 42?

10 A. Yes.

11 Q. Was Alex --

12 A. I'm sorry, repeat that last
13 question.

14 Q. I was asking whether the cast
15 the group of folks who were assistant store
16 managers or senior managers whether that
17 changed over time at 42?

18 A. Yes, it did.

19 Q. Was Alex there most of the time
20 that you were there?

21 A. Yes, he left the store briefly
22 and he -- he left the store for a while and
23 came back.

24 Q. You were first when you were at
25 42 in bedding as the department manager?

1 WHALEY

2 A. Correct.

3 Q. How many hourly sales
4 associates worked in bedding?

5 A. I can't recall that number.

6 Q. For how long approximately did
7 you work as a department manager of bedding?

8 A. In bedding?

9 Q. Yes.

10 A. Seven months.

11 Q. Then did you move to a
12 different department?

13 A. Yes, I did.

14 Q. What department did you move
15 to?

16 A. I moved to the hard side
17 department.

18 Q. What does hard side mean?

19 A. The hard side department
20 consists of kitchen, kitchen gadgets,
21 cookware, electronic blending, summer
22 seasonal product, Christmas, Thanksgiving
23 product.

24 Q. For how long were you a
25 department manager in the hard side

1 WHALEY

2 department?

3 A. I was a department manager for
4 the hard side department maybe two months.

5 Q. What department did you go to
6 after that?

7 A. After that I was sent to the
8 warehouse department upstairs.

9 Q. For how long were you at the
10 warehouse department?

11 A. Almost two years.

12 Q. How many hourly sales or hourly
13 folks were there in the warehouse at the time
14 you were the department manager?

15 A. About five.

16 Q. What was the next department at
17 which you worked?

18 A. The next department would be
19 the front end cashiering.

20 Q. For how long were you at that
21 department approximately?

22 A. About four months, four or five
23 months.

24 Q. How many hourlies were there in
25 the front end?

1 WHALEY

2 A. I can't recall that number.

3 It's a lot of associates.

4 Q. More than 20 or so?

5 A. Yes.

6 Q. What was your next department?

7 A. The Harmon's department, health
8 and beauty.

9 Q. How long were you at Harmon
10 department?

11 A. Almost two years. Probably
12 like a year and about six months.

13 Q. How many hourlies were there in
14 that department while you were there?

15 A. It varied so it started off
16 with like 14, then went down to 10 so
17 anything in the range from 10 to like 14
18 associates.

19 Q. So just to make sure I got this
20 right, when you were in Harmon during the
21 hours that you were there as the department
22 manager, were there any other department
23 managers for Harmon who were on site?

24 A. When I first started, yes, on
25 site there was Lynette was department manager

1 WHALEY

2 with me.

3 Q. Did you work the same hours the
4 two of you?

5 A. I think so. Kenny was a
6 department manager with me. After that it
7 was just me.

8 Q. So at some point the group of
9 folks working the hours that you worked in
10 Harmon was you and ten to 14 hourlies?

11 A. Yes.

12 Q. What was your next department?

13 A. I resigned after that.

14 MR. SULDS: Off the record.

15 (Discussion off the record.)

16 THE VIDEOGRAPHER: The time is
17 12:34 p.m. on July 19, 2017. We are
18 now off the record.

19 (Recess taken.)

20 THE VIDEOGRAPHER: This marks
21 the beginning of card two in the
22 deposition of Andrae Whaley. Time is
23 12:39 p.m. on July 19, 2017. We are
24 now back on the record. You may
25 proceed.

1 WHALEY

2 Q. You doing okay there, Mr.

3 Whaley?

4 A. I'm doing fine.

5 Q. Thinking about the answers that
6 you gave to the questions I asked before we
7 took a break, is there anything you want to
8 add to those answers?

9 A. Not that I can recall.

10 Q. Any of the answers you want to
11 change?

12 A. No.

13 Q. You having any difficulty
14 following the questions that I'm asking?

15 A. No.

16 Q. Do you have any questions for
17 me?

18 A. Not yet.

19 Q. There came a point in this
20 lawsuit where on behalf of Bed Bath we asked
21 that you provide us with a bunch of
22 documents; do you recall that?

23 A. Yes.

24 MR. SULDS: Mark that as 2,
25 please.

1 WHALEY

2 (Defendant's Exhibit Whaley 2,
3 Plaintiffs' Objections and Responses
4 to Defendant's First Request For The
5 Production of Documents, marked for
6 Identification.)

7 Q. Do you have Exhibit 2 in front
8 of you?

9 A. Yes, I do.

10 Q. Have you seen that before?

11 A. Yes, I have.

12 Q. Have you provided to your
13 lawyer for you lawyer to provide to us all
14 the documents you have which are responsive
15 to that?

16 A. Yes, I have.

17 Q. I have two groups of documents
18 that are marked 76 AW through 81 AW and 231
19 AW through 237 AW. I'm going to show them to
20 you. I didn't make any other copies. Would
21 you take a look through those, please, and
22 tell me if there are any documents that you
23 had which are responsive to our document
24 request that are not included in those two
25 groups?

1 WHALEY

2 A. I don't understand the question
3 you are asking.

4 Q. So there was a request for
5 documents?

6 A. Correct.

7 Q. That's Exhibit 2 in front of
8 you and we have received those documents.
9 They are in two groups and if you take a look
10 in handwriting at the bottom of the pages
11 there are numbers?

12 A. Um-hum.

13 Q. Those are called Bates numbers,
14 it's how lawyers identify the documents?

15 A. Okay.

16 Q. What I'm asking is whether
17 there's anything else in addition to these
18 documents that you have which is responsive
19 to the document request?

20 A. No.

21 Q. Do you keep a diary?

22 A. I'm sorry?

23 Q. Do you write in a diary about
24 things?

25 A. No.

1 WHALEY

2 Q. Do you keep notes of any kind
3 either in writing or in a computer format?

4 A. No.

5 Q. Do you have any recordings
6 whether they are electronic or paper and
7 pencil physical having to do with any part of
8 your employment at Bed Bath or the claims you
9 have here other than this group of documents
10 that's in front of you?

11 A. No.

12 Q. Let me take those two groups of
13 documents back from you. Thank you.

14 MR. SULDS: Mark this as 3,
15 please.

16 (Defendant's Exhibit Whaley 3,
17 Department Level Manager Compensation,
18 marked for Identification.)

19 Q. Do you have Exhibit 3 in front
20 of you?

21 A. Yes.

22 Q. Is that your signature on it?

23 A. Yes.

24 Q. There is a date there 7/18/11.
25 Is that your handwriting?

1 WHALEY

2 A. Yes.

3 Q. Did you sign this document on
4 or about the date that's indicated there?

5 A. Yes.

6 Q. Did you read the document
7 before you signed it?

8 A. I don't recall the document. I
9 don't recall if I read it or not.

10 Q. Earlier in the deposition you
11 said that you not only read, but asked
12 questions about documents before you signed
13 it?

14 A. Yes.

15 Q. So is it fair to say that this
16 is a document that you read and asked
17 questions about before you signed it?

18 MS. LIU: Objection.

19 A. Like I said, I don't recall if
20 I asked questions about it. My signature is
21 here so I signed it.

22 Q. Would you take a look at your
23 Declaration which is Exhibit 1, please. Take
24 a look, please, at paragraph 9. Do you have
25 that in front of you?

1 WHALEY

2 A. Yes, I do.

3 Q. About four lines down you see
4 you say it's in reference to a meeting with
5 Francis McKinley, "I think this time I was
6 also given a piece of paper with some sort of
7 calculation chart on it"?

8 A. Yes.

9 MR. SULDS: Mark this as 4
10 please.

11 (Defendant's Exhibit Whaley 4,
12 Pay Stub, marked for Identification.)

13 Q. Do you have 4 in front of you?

14 A. Yes, I do.

15 Q. Is 4 the piece of paper that
16 you make reference to in paragraph 9 of your
17 Declaration?

18 A. Yes.

19 MR. SULDS: Would you mark
20 those sequentially 5, 6, 7, 8, 9.

21 (Defendant's Exhibit Whaley 5,
22 Document, marked for Identification.)

23 (Defendant's Exhibit Whaley 6,
24 Document, marked for Identification.)

25 (Defendant's Exhibit Whaley 7,

1 WHALEY

2 Document, marked for Identification.)

3 (Defendant's Exhibit Whaley 8,

4 Document, marked for Identification.)

5 (Defendant's Exhibit Whaley 9,

6 Document, marked for Identification.)

7 Q. By the way, Mr. Whaley, before
8 I ask you about these documents, let me ask
9 you about at store 42. Were there any human
10 resource folks present? Was there a human
11 resource office at store 42?

12 A. Yes.

13 Q. Was there a human resources
14 office present throughout the time that you
15 were at store 42?

16 A. Yes.

17 Q. Did you understand that the
18 human resource office was there if you had
19 any questions about your employment?

20 A. Yes.

21 Q. Take a look at what's marked as
22 Exhibit 5, please. Is that your signature at
23 the bottom?

24 A. Yes.

25 Q. Where it says to be completed

WHALEY

by associate?

A. Yes.

Q. There is a date there 7/18/11,
do you see that?

A. Yes.

Q. Is that your handwriting?

A. Yes.

Q. Did you sign this document on
or about 7/18/11?

A. Yes.

Q. Take a look at number 6,
please. Is that your signature there under
where it says to be completed by associate?

A. Yes.

Q. There is a date there 1/4/12,
is that your handwriting?

A. Yes.

Q. Did you sign this document on
or about 1/4/12?

A. Yes.

Q. Take a look at 7, please?

A. Yes.

Q. Is that your signature on it?

A. Yes.

1 WHALEY

2 Q. There is a date there 1/1/13,
3 is that your handwriting?

4 A. Yes.

5 Q. Did you sign this document 7 on
6 or about 1/1/13?

7 A. Yes.

8 Q. Take a look at 8, please.

9 A. Yes.

10 Q. Is that your signature on the
11 document under to be completed by associate?

12 A. Yes.

13 Q. There is a date there 8/9/13;
14 is that your handwriting?

15 A. No.

16 Q. Beg your pardon?

17 A. You asked me if 8/9/13 is my
18 handwriting.

19 Q. Yes.

20 A. No.

21 Q. Do you know whose handwriting
22 it is?

23 A. No, I do not.

24 Q. But that is your signature?

25 A. Yes.

1 WHALEY

2 Q. Okay. Take a look at 9,
3 please. Is that your signature in the space
4 that's to be completed by associate?

5 A. Can I go back if you don't
6 mind?

7 Q. Sure.

8 A. 8/09/13 is not my signature.

9 Q. You say that's not your
10 signature?

11 A. That's not my signature.

12 Q. What about Exhibit 9; is that
13 your signature?

14 A. That is my signature.

15 Q. The date that's there 1/21/14;
16 is that your handwriting?

17 A. Yes.

18 Q. Did you sign that document
19 Exhibit 9 on or about that date?

20 A. Yes.

21 Q. Let me ask you just to take a
22 look at 9, Exhibit 9 under the third sort of
23 grouping here where it says department
24 manager?

25 A. Yes.

1 WHALEY

2 Q. Do you see where it says
3 overtime rate of pay "rate fluctuates based
4 on hours worked in excess of 40"?

5 A. Yes.

6 Q. Then there is an asterisk there
7 and right underneath it there is some writing
8 in italics. Will you read that paragraph in
9 italics that starts as the department
10 manager?

11 A. Yes, I will read it. As a
12 department manager, your base weekly salary
13 is compensation for all hours you have worked
14 in the week, regardless of the number of
15 hours you work. You will also be paid an
16 additional amount for any hours worked over
17 40 in one week. Please refer to the attached
18 department manager's bi-weekly pay stub for a
19 detailed explanation.

20 Q. You have Exhibit 4 in front of
21 you, don't you?

22 A. Yes.

23 Q. That's the department manager's
24 bi-weekly pay stub?

25 MS. LIU: Objection.

1 WHALEY

2 Q. That's what it's called?

3 A. Repeat that question one more
4 time.

5 Q. This Exhibit 4 is called
6 department manager's bi-weekly pay stub,
7 correct?

8 A. Is it called it, yes.

9 Q. You were paid every two weeks
10 by Bed Bath; is that correct?

11 A. That's correct.

12 Q. You received earning statements
13 for each of those payments, didn't you?

14 A. Yes.

15 Q. So if I were to show you, for
16 example, what is 76 AW, your earning
17 statement, that tells you the amount that you
18 earned, correct?

19 A. It does.

20 Q. Let me take that back from you
21 for one second if I may, please.

22 A. Sure.

23 Q. If I were to show you 77A, that
24 also tells you, I'm going to hand that to
25 you, how much you were paid, doesn't it?

1 WHALEY

2 A. Yes, it does.

3 Q. Let me take that back from you.
4 When if ever did you go to HR or anybody else
5 and say I wasn't paid properly?

6 A. I did go to HR, the date I
7 can't recall and I spoke to Suzanne. She was
8 the human resource manager at the time.

9 Q. When you say you went to her,
10 where did you go to her?

11 A. In her office.

12 Q. That was an office in store 42?

13 A. Yes.

14 Q. That was the regular HR office
15 for store 42?

16 A. Yes.

17 Q. There were file cabinets and a
18 computer and other sorts of things like that
19 for an office there?

20 A. Yes, there are.

21 Q. What did you say to her and
22 what did she say to you?

23 A. I asked her could she explain
24 -- could she explain the overtime process.
25 Could she explain why at that time I had a

1 WHALEY

2 certain amount of hours and my paycheck was
3 maybe like only extra \$40 or \$20 and I said
4 it just doesn't seem right. She said she
5 will get back to me on that, but she never
6 got back to me on that.

7 Q. When was that that you went to
8 Suzanne?

9 A. That was in the year of maybe
10 2011, late 2011 or could be early 2012.

11 Q. Did you ever ask anybody else
12 about your pay at any other time?

13 A. No.

14 Q. Why not?

15 A. My hour pay, that's something
16 that is confidential so I'm not going to
17 speak to everyone else but HR who would be
18 able to best give us information on that.

19 Q. Did you talk to HR more than
20 once about your pay?

21 A. No, I spoke to HR once about
22 it, she said she would get back to me and she
23 just never got back to me.

24 Q. Does Bed Bath and Beyond
25 maintain a 1-800 number for complaints by

1 WHALEY

2 employees?

3 A. I can't recall. I don't
4 remember if they do.

5 Q. Were there other HR folks that
6 you knew or had met besides Suzanne?

7 A. Yes, at that time I don't
8 remember her name. She was in the office
9 further down in the building. I can't
10 remember her name.

11 Q. Did you go and speak to that
12 person?

13 A. No, I did not.

14 Q. Did you speak to a store
15 manager or senior manager and say I'm not
16 being paid properly?

17 A. No.

18 Q. Did you speak to a district
19 manager and say I'm not being paid properly?

20 A. No.

21 Q. Didn't call the general counsel
22 of the company and say I'm not being paid
23 properly, did you?

24 A. I don't know who the general
25 counsel of the company is.

1 WHALEY

2 Q. You didn't speak to anybody?

3 A. I didn't speak to anyone else
4 but Suzanne.

5 Q. What was it when you went into
6 see Suzanne that you thought was not correct
7 about the way you were being paid?

8 A. I did not understand why am I
9 doing all these hours and it seems like the
10 more hours I do, the less I get paid. I had
11 an understanding that if we do any extra
12 hours, then we get paid overtime.

13 MR. SULDS: I think if everyone
14 is agreeable now is a good time to
15 take a break for 20 minutes.

16 THE VIDEOGRAPHER: The time is
17 1:02 p.m. on July 19, 2017. We are
18 now off the record.

19 (Luncheon recess taken at 1:00
20 p.m.)
21
22
23
24
25

1 WHALEY

2 A F T E R N O O N S E S S I O N

3 (Time Noted: 1:50 p.m.)

4
5 A N D R A E W H A L E Y, resumed and
6 testified as follows:

7
8 CONTINUED EXAMINATION

9 BY MR. SULDS:

10 THE VIDEOGRAPHER: Time is 1:50
11 p.m. on July 19, 2017. We are now
12 back on the record. You may proceed.

13 Q. How are you, Mr. Whaley?

14 A. I'm okay. yourself?

15 Q. Doing fine, thank you. Over
16 the break did you have anything alcoholic to
17 drink?

18 A. No.

19 Q. Did you take any prescription
20 medications?

21 A. No.

22 Q. Take any non prescription
23 medications?

24 A. No.

25 Q. As we sit here now, is there

1 WHALEY

2 any reason you can think of why you can't
3 answer my questions fully, completely and
4 truthfully?

5 A. No.

6 Q. If you think back about the
7 testimony you have already given, is there
8 any answer you want to change?

9 A. No.

10 Q. Is there any answer you want to
11 add to?

12 A. No.

13 Q. When you were at store 42, you
14 sometimes worked 47-and-a-half hours a week;
15 do I understand that?

16 A. What do you mean sometimes?

17 Q. Were there times where you
18 worked more than 50 hours in a week?

19 A. Yes.

20 Q. Were there times where you
21 worked more than 55 hours in a week?

22 A. Yes.

23 Q. Were there times where you
24 worked more than 60 hours in a week?

25 A. Yes.

1 WHALEY

2 Q. Were there times when you
3 worked less than 50 hours in a week?

4 A. Yes.

5 Q. Your work week fluctuated from
6 week to week; is that correct?

7 MS. LIU: Objection.

8 A. What do you mean fluctuated?

9 Q. What does the term fluctuate
10 mean to you?

11 A. May have changed.

12 Q. So if that's the definition, is
13 it accurate to say that your hours each week
14 fluctuated?

15 A. I don't know what you mean by
16 my hours fluctuated.

17 Q. Let me step back and take it a
18 different way. You knew, didn't you, that
19 you were not going to work exactly
20 47-and-a-half hours every week?

21 MS. LIU: Objection.

22 A. No. The schedule is posted to
23 47.5 hours. Now on a normal day basis or
24 excuse me, a normal week we always hit above
25 47.5 hours.

1 WHALEY

2 Q. Sometimes for back to school,
3 the hours would be longer than other times,
4 right?

5 A. Of course. In any retailer,
6 you go through seasonal transitions.
7 Sometimes the needs of the business, the
8 company asks you to do these hours meaning we
9 work six days, maybe sometimes even seven
10 days so we understood that. That is told to
11 us. You know so in our holiday season at Bed
12 Bath and Beyond our holiday season was
13 starting the end of August so we knew that we
14 would work over 50 or 60 hours in a week.
15 Christmas sometimes maybe even at the end of
16 Christmas when you have to do inventory as
17 well, but besides that, the regular schedule
18 was 47.5, but we always did above 47.5 hours.

19 Q. That was explained to you at
20 the beginning of your employment at Bed Bath
21 that back to school, for example, would be a
22 little busy?

23 MS. LIU: Objection.

24 A. Yes, we were explained that
25 back to school would be a busy part of this

1 WHALEY

2 particular store.

3 Q. And vacations as well, that
4 those would be particularly busy?

5 A. I don't understand what you
6 mean.

7 Q. Was that explained to you
8 during orientation or early into your
9 employment?

10 A. You said that vacations as well
11 would be very busy?

12 Q. That I'm sorry, holiday time,
13 my mistake, was that explained to you that
14 Christmas or other holidays might be
15 particularly busy?

16 A. No. No. It was explained that
17 during Christmas and holiday season that
18 sometimes the business might pick up, but our
19 back to school season -- so we knew our
20 business would pick up like any other
21 retailer business picks up during the holiday
22 season so we have to do what's required for
23 the business.

24 Q. Earlier when I asked you
25 whether there was anybody in addition to

1 WHALEY

2 Suzanne who you knew was at store 42 and had
3 a human resource function you said there was
4 someone down the hall from Suzanne?

5 A. Yes.

6 Q. Was that Lauren?

7 A. No.

8 Q. This lady who is sitting to my
9 left?

10 A. No, it was another lady at that
11 time. I don't remember her name.

12 Q. Each year it seems if you take
13 a look at Exhibits 5 or 6 or 7 in addition to
14 your signing those documents someone else
15 from Bed Bath and Beyond signed those
16 documents, correct?

17 A. Yes.

18 Q. Did you ever ask if any of the
19 people who signed these Exhibits 5, 6, 7, 8
20 and 9, did you ever ask any of those people
21 about your pay?

22 A. No. I spoke to -- as I stated,
23 I spoke to Suzanne about it that particular
24 day.

25 Q. But that was in 2011 if I

1 WHALEY

2 recall correctly?

3 A. 2011 or 2012. I can't
4 remember. It was later on in 2011 or early
5 2012.

6 Q. So, for example, if you take a
7 look at Exhibit 7, that's signed by someone
8 who looks like maybe M. Brown?

9 A. Yes.

10 Q. You didn't say by the way, I'm
11 waiting for an answer from Suzanne about
12 calculation of my pay, did you?

13 A. No, I did not.

14 Q. Okay.

15 Q. One of the things that you
16 learned about in orientation was that Bed
17 Bath and Beyond expected you to be on time
18 for your job; isn't that correct?

19 A. That is correct.

20 Q. Fair to say, isn't it, that Bed
21 Bath and Beyond had a policy that told you
22 and associates that on time attendance was
23 part of the job, correct?

24 A. Yes.

25 Q. That was important being on

1 WHALEY

2 time because if you were not on time, someone
3 else had to pick up the slack for you, right?

4 A. That's correct.

5 Q. It's a fact, isn't it,
6 throughout a large portion of the time you
7 were employed by Bed Bath and Beyond that
8 there were issues concerning your being there
9 on time?

10 A. That is correct.

11 Q. And you were spoken to and
12 written up for that; is that right?

13 A. That is correct.

14 MR. SULDS: If you could mark
15 that as 10, please.

16 (Defendant's Exhibit Whaley
17 10, Associate Disciplinary Notice,
18 marked for Identification.)

19 Q. Do you recognize Exhibit 10?

20 A. Yes.

21 Q. This is a write up you received
22 for repeated lateness, correct?

23 A. Yes.

24 Q. Who is August, I don't know the
25 last name. Was there a senior manager

1 WHALEY

2 August?

3 A. Yes.

4 Q. You mentioned Kristin Thompson.

5 Who is Kristin Thompson?

6 A. She's the store manager of
7 store 42.

8 Q. Did there come a point in time
9 where you had a conversation with Kristin
10 Thompson about your attendance and
11 particularly in reference to a car being
12 stuck in a snow bank?

13 A. I'm sorry, what was the
14 question?

15 Q. Was there an incident where you
16 talked to Kristin Thompson about leaving
17 early on a day where you had had a problem
18 with your car being stuck in a snow bank?

19 A. No, I don't remember that.

20 Q. You were scheduled to work that
21 day 7 to 5:30, called the store to say that
22 your car was stuck and needed to get it
23 towed?

24 A. Okay, yeah, but I didn't leave
25 early from work. I don't think I was at

1 WHALEY

2 work.

3 Q. Is August's last name
4 Savoretti?

5 A. It could be.

6 Q. He was an assistant store
7 manager?

8 A. Yes, he was an assistant store
9 manager.

10 Q. Did he ever criticize your
11 work?

12 A. No. He, you know, he would
13 just tell us what to do as far as how he
14 wanted things or the way he wanted things to
15 be or if we had to pack out or clean up the
16 rug or something like that.

17 Q. August ever have a conversation
18 with you about you not being on time?

19 A. Yes.

20 Q. He told you you had to be on
21 time?

22 A. Yes, he did.

23 Q. Told you there would be
24 disciplinary consequences if you were not on
25 time?

1 WHALEY

2 A. Yes, he did.

3 MR. SULDS: Could you mark that
4 as 11, please.

5 (Defendant's Exhibit Whaley
6 11, Associate Disciplinary Notice,
7 marked for Identification.)

8 Q. Mr. Whaley, do you have Exhibit
9 11 in front of you?

10 A. Yes, I do.

11 Q. Do you recognize it?

12 A. Yes.

13 Q. In the lower right hand corner
14 it says over associate's signature date
15 refuse to sign. Did you refuse to sign when
16 this was given to you?

17 A. Yes, I did.

18 Q. Why?

19 A. There's a part in the
20 documentation scheduled at 7 to 5:30, came in
21 from 10 to 8:30.

22 Q. Why did refuse to sign this
23 document?

24 A. Because the schedule change was
25 approved by one of the senior managers.

1 WHALEY

2 Q. In the facts leading to
3 discipline section says you were previously
4 spoken to about lateness on 11/4/14. That's
5 accurate, wasn't it?

6 A. I mean it could be. I can't
7 recall.

8 Q. Did Mr. Savoretti ever speak to
9 you about putting signs up on the side caps
10 of the suntan fixture in the store?

11 A. I don't recall that. I can't
12 remember that.

13 Q. Did he ever tell you that
14 signing standards were non negotiable?

15 A. I can't remember that either.

16 Q. That was the sort of thing that
17 he would say?

18 A. I couldn't remember that.

19 Q. Did Mr. Savoretti ever talk to
20 you about constantly talking to a woman named
21 Kenya?

22 A. No.

23 Q. Not walking your department to
24 make sure your staff was engaged in selling?

25 A. No.

1 WHALEY

2 Q. You sure?

3 A. Yeah. I don't know who Kenya,
4 a woman named Kenya.

5 Q. Your time for which you would
6 be paid was recorded through a time clock; is
7 that correct?

8 A. At the beginning, no. Towards
9 down I think the later part of like the last
10 year or two, yes.

11 Q. Were you ever disciplined for
12 false time clock swipes or punches?

13 A. Yes.

14 MR. SULDS: Make this 12,
15 please.

16 (Defendant's Exhibit Whaley
17 12, Associate Disciplinary Notice,
18 marked for Identification.)

19 Q. Do you recognize Exhibit 12?

20 A. Yes.

21 Q. Is that your signature at the
22 bottom of it?

23 A. Yes.

24 Q. Was there a specific Harmon
25 team that you were the department manager

1 WHALEY

2 for?

3 A. I'm sorry, repeat the question.

4 Q. Does the term Harmon team mean
5 something to you?

6 A. No.

7 Q. You said earlier in the
8 deposition that you were a department head
9 for Harmon?

10 A. Yes.

11 Q. Were there keys for the Harmon
12 area?

13 A. Yes, there was a lock. I think
14 there was a key for the lock cage. It would
15 mean the stock room. We keep high price
16 merchandise in there.

17 Q. Did August Savoretti when he
18 was an assistant store manager ever criticize
19 you for care of those keys?

20 A. No.

21 Q. Was there another Harmon
22 department manager by the name of Kenny?

23 A. Yes.

24 Q. Who is Alex Gayl?

25 A. Alex Gayl is another assistant

1 WHALEY

2 store manager of the store.

3 Q. Did Mr. Gayl ever talk to you
4 about inventory prep?

5 A. Yes.

6 Q. He disciplined you for that?

7 A. Yes, he did. Hold on. No, he
8 didn't, no. No. We spoke about inventory
9 prep. The issue was that I think we had to
10 make sure we had a specific order in at a
11 specific time and we mixed up the dates the
12 wrong way, but that was just about it.

13 Q. He counseled you about that?

14 A. The inventory, no, he didn't
15 counsel me about the inventory prep, no.

16 Q. What about over stocks being
17 placed behind wall art. Did Mr. Gayl ever
18 discipline you for that?

19 A. Over stocks behind wall art?

20 Q. Yes.

21 A. As in a write up for over
22 stocks behind wall art?

23 Q. Or just a verbal counseling?

24 A. If we spoke about it, yes, we
25 did speak about that, yes.

1 WHALEY

2 Q. What about a sense of urgency?

3 A. Did we speak about that?

4 Q. Yes.

5 A. We did speak about that.

6 Q. Tell me what that conversation
7 was, please?

8 A. He said that you have to make
9 sure that you finish your -- you have to have
10 a sense of urgency when you start and
11 complete a task within the department.

12 Q. He told you that you needed to
13 follow up better on the execution of tasks;
14 is that right?

15 A. Yes.

16 Q. You needed to plan tasks
17 better; is that correct?

18 A. Yes.

19 Q. That you needed to reach out in
20 advance if you needed help, correct?

21 A. Yes.

22 Q. And to know tasks that the
23 tasks had to be completed on a schedule; is
24 that correct?

25 A. Yes.

1 WHALEY

2 Q. What about availability of
3 associates? What does that mean to you that
4 phrase availability of associates?

5 A. Say that one more time, I'm
6 sorry.

7 Q. Did Mr. Gayl ever speak to you
8 asking you about providing him and August
9 about the availability of associates so that
10 scheduling needs could be assessed?

11 A. Yes, he did.

12 Q. Did he criticize you for not
13 providing those availabilities?

14 A. Yes, he did and the feedback
15 given to him was that he had received
16 availabilities, but he never utilized it.

17 Q. That was among his duties and
18 responsibilities, wasn't it, to criticize you
19 if you didn't perform the way he thought you
20 needed to?

21 MS. LIU: Objection.

22 A. Repeat the question.

23 Q. Did you understand that Mr.
24 Gayl had that responsibility to criticize
25 your work if he thought that it was necessary

1 WHALEY

2 to criticize it?

3 A. Yes. Any one of your bosses
4 can criticize your work.

5 Q. August was your boss?

6 A. Yep.

7 Q. Mr. Gayl was your boss?

8 A. Yes.

9 Q. What does it mean to lighten up
10 an order?

11 A. To lighten up an order would
12 mean that you have to scale back on a number
13 of items that you are bringing into the
14 department.

15 Q. And did Mr. Gayl ever direct
16 you to lighten up orders?

17 A. Yes, he did.

18 Q. As your boss, that was one of
19 his duties and responsibilities?

20 MS. LIU: Objection.

21 MR. SULDS: What's the
22 objection?

23 MS. LIU: What's the foundation
24 of that question? You are rephrasing
25 or testifying saying was that your

1 WHALEY

2 understanding.

3 Q. Did you understand it to be
4 within the scope of Mr. Gayl's authority to
5 criticize you for failing to lighten up an
6 order?

7 A. I don't understand the question
8 you are asking. I'm sorry.

9 Q. Let's start again. Lightening
10 up an order means reducing it, correct?

11 A. Yes.

12 Q. Mr. Gayl talked to you about
13 that, correct?

14 A. Yes.

15 Q. He criticized you for that, did
16 he not, that you did not follow up directions
17 and lighten up orders?

18 A. Yes.

19 Q. Did you understand that that
20 was within his authority to criticize you for
21 not lightening up orders?

22 MS. LIU: Objection.

23 A. Like I said, he's an ASM so
24 he's above me so he made all the decisions.

25 Q. Did there come a point in time

1 WHALEY

2 when Mr. Gayl coached you on lack of planning
3 for HBC inventory?

4 A. What do you mean coached me;
5 like spoke to me?

6 Q. Yes.

7 A. Yes, he spoke to me about that.

8 Q. Did he criticize you for
9 failing to execute on a plan?

10 MS. LIU: Objection.

11 A. What do you mean criticize?

12 Q. Did he tell you you failed to
13 execute on a plan and that you had to do
14 better?

15 A. Yes.

16 Q. Did Mr. Gayl walk your
17 department from time to time?

18 A. Yes.

19 Q. Did he tell you that you had
20 multiple boxes of mixed merchandise in the
21 stock room, boxes of fixtures mixed with
22 boxes of merchandise, damaged merchandise
23 overflowing?

24 A. I don't recall the conversation
25 that we had when it came to in particular

1 WHALEY

2 boxes, but we spoke about things pertaining
3 to the department.

4 Q. Did Mr. Gayl tell you that you
5 needed to delegate cleaning up those various
6 issues by delegating to the overnight team?

7 A. No.

8 Q. Did Mr. Gayl counsel you in
9 connection with stock room maintenance and
10 preparedness for an inventory?

11 MS. LIU: Objection.

12 A. What do you mean counsel me?

13 Q. Did he call to your attention
14 that you were not prepared for the inventory
15 and tell you you had to be?

16 A. Yes.

17 Q. Did Mr. Gayl tell you to set up
18 a hair accessory feature within your
19 department?

20 A. I don't recall.

21 Q. Did Mr. Gayl talk to you on a
22 number of occasions about the need to have a
23 one to two week supply in your department?

24 A. Yes.

25 Q. Did he criticize you for

1 WHALEY

2 failing to execute a sign walk?

3 A. I don't recall.

4 Q. What is a sign walk?

5 A. A sign walk would mean that you
6 have to make sure that everything that has a
7 label or everything that needs a sign or
8 price has to have a sign or price.

9 Q. In 2016 your department had a
10 very significant loss in sales, didn't it?

11 A. Yes, it did.

12 Q. Did Mr. Gayl go over that with
13 you and tell you that that could not be
14 tolerated?

15 A. No.

16 Q. What did he tell you?

17 A. We always talked about sales
18 because the entire store was down in sales so
19 we just talked about trying to make sure that
20 we get the sales up in general.

21 Q. Would it be accurate to say
22 that on March 24th of 2016 Mr. Gayl reviewed
23 with you the unprecedented loss of sales in
24 the department which brought the year to date
25 results to a negative number?

1 WHALEY

2 MS. LIU: Objection.

3 Q. And that the over stock should
4 no longer be utilized behind wall art?

5 A. I don't remember the date that
6 we spoke about that. I don't recall a
7 conversation or date about that. Like I
8 said, it's a retail business so we speak
9 about those things.

10 Q. Specifically with reference to
11 over stock not being behind wall art, do you
12 recall that Mr. Gayl told you that that could
13 not go on?

14 A. Yes.

15 Q. Do you recall that subsequently
16 it was learned that you had continued to have
17 over stock behind wall art in your
18 department?

19 A. Yes.

20 Q. As a result of that and certain
21 other matters you were placed on a
22 performance improvement plan, weren't you?

23 A. Yes, I was.

24 Q. Was there a person within the
25 management of store 42 to whom you were

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WHALEY

supposed to relate, you know, talk about the performance improvement plan?

A. Yes, Alex. It was Alex.

MR. SULDS: Can you mark this as 13.

(Defendant's Exhibit Whaley 13, Performance Improvement Plan, marked for Identification.)

Q. Do you recognize Exhibit 13?

A. Yes.

Q. If you take a look at the third page is that your signature on it?

A. Yes.

Q. You signed this and there is some dates there looks like May 6, 2016?

A. I don't recall the day I signed, but my signature is there so I did sign it, but I don't recall.

Q. You read it before you signed it, didn't you?

A. Yes, I did.

Q. Ask any questions you felt were necessary to ask about it?

A. I believe so.

1 WHALEY

2 Q. You worked through the
3 performance improvement plan and were
4 subsequently taken off the plan, correct?

5 A. Yes, I was.

6 Q. And then at some point after
7 that you left Bed Bath and Beyond, correct?

8 A. Yes.

9 Q. I'm going to ask you to refer
10 back to your declaration which is Exhibit 1.
11 Should be there in front of you.

12 A. Just give me one second, I'm
13 sorry. Yes, I have it.

14 Q. I'm going to ask you to look at
15 paragraph 18. You say in that paragraph all
16 DMS', that's department managers, correct?

17 A. That is department managers,
18 yes.

19 Q. Responsibilities are similar
20 from store to store. You didn't work at any
21 stores in New Jersey, did you, any Bed Bath
22 and Beyond stores in New Jersey?

23 A. No.

24 Q. And you didn't work at any Bed
25 Bath and Beyond stores in Connecticut, did

1 WHALEY

2 you?

3 A. No.

4 Q. You didn't work at any Bed Bath
5 and Beyond stores in Westchester, correct?

6 A. No.

7 Q. The only stores that you worked
8 at were the ones that you told us about 42,
9 the Long Island store and the two Manhattan
10 stores where you did over nights, right?

11 A. Yes.

12 Q. When you did over nights at
13 those two Manhattan stores, were the stores
14 open and functioning?

15 A. No.

16 Q. So when you were at the Long
17 Island store, was that during normal opening
18 hours for the store?

19 A. Yes.

20 Q. So your experience as to the
21 operation of the stores is limited to store
22 42 and the Long Island store; is that
23 correct?

24 A. Say that again.

25 Q. Do you have any experience of

1 WHALEY

2 what DM responsibilities are other than from
3 your work at store 42 or the store on Long
4 Island?

5 A. What question are you asking
6 exactly?

7 Q. Paragraph 18 of your Affidavit
8 says all DMs' responsibilities are similar
9 from store to store. That's based on your
10 personal knowledge that statement, isn't it?

11 A. Yes.

12 Q. And your personal knowledge
13 about what DM responsibilities are covers
14 store 42, right?

15 A. Yes.

16 Q. And it may cover the store on
17 Long Island where you worked, correct?

18 A. Yes.

19 Q. But you don't have personal
20 knowledge of any other store and the
21 responsibilities that DMs had there, do you?

22 A. I only go by what I see. I do
23 shop at other stores.

24 Q. What other stores do you shop
25 at?

1 WHALEY

2 A. The Bronx store, the Jersey
3 store in Paramus so there's other stores and
4 when I am visiting there you see managers
5 ringing, you see managers doing maintenance
6 work as well, you see managers stocking.

7 Q. So you shopped at a store in
8 the Bronx?

9 A. Yes, I have.

10 Q. And a store in Paramus?

11 A. Yes, I have.

12 Q. Any place else?

13 A. Not that I know of.

14 Q. Take a look at paragraph 22
15 which reads throughout my employment with
16 BBB, I believe that I had to work the full
17 scheduled shift hours unless I had available
18 paid absence hours to be paid my full salary?

19 A. Um-hum.

20 Q. What's the basis of that
21 belief?

22 A. That if I didn't work the
23 hours, that my salary would be deducted.

24 Q. Did that happen?

25 A. Yeah.

1 WHALEY

2 Q. When?

3 A. I was out 2012 I was out for a
4 while. I had developed a health issue on my
5 face and I believe I wound up having to use
6 some vacation time to cover my hours.

7 Q. That's the basis of this
8 statement?

9 A. No, the basis -- what question
10 were you asking?

11 Q. The basis of the statement in
12 paragraph 22, what's the source of your
13 belief that you had to work the full
14 scheduled hours unless you had available paid
15 absence hours?

16 A. Right so now like I said I was
17 out and if I didn't use those hours, my
18 vacation hours, then I wouldn't be paid.

19 Q. In paragraph 23 you say
20 throughout my employment with BBB, I believe
21 that if I exhausted all my paid leave, but I
22 needed to take extra days off, BBB would
23 deduct my salary. Did that ever happen to
24 you?

25 A. Yes, when I was out -- well, I

1 WHALEY

2 never really exhausted my paid leave because
3 I did have vacation time so that never
4 happened for me.

5 Q. Let's look at paragraph 23.
6 I'm reading the second, sorry, paragraph 24,
7 you say in the second sentence that on or
8 about October 2014, BBB gave you a write up
9 under excessive absence for took one day sick
10 leave beyond 40 hour sick leave hours. Do
11 you have a copy of that?

12 A. No, I wouldn't have a copy of
13 that documentation.

14 Q. Why not?

15 A. We don't get to keep our copies
16 of documentation.

17 Q. You are sure this was in
18 October of 2014?

19 A. You know, things happened so
20 far back, I can't recall. It could have been
21 September or it could have been October.

22 Q. If I were to represent to you
23 that I have given you as exhibits all the
24 write ups that BBB has in its possession in
25 connection with you, could you identify for

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WHALEY

me in those exhibits any of them that writes
you up for taking one day sick leave beyond
40 hours sick leave hours?

MS. LIU: Objection.

A. The exhibits that are in front
of me do not have that, but as I stated it
could have been September or October, it was
in 2014 and that actually happened.

MR. SULDS: Let's go off the
record for a minute or two.

THE VIDEOGRAPHER: Time is 2:32
p.m. on July 19, 2017. We are now off
the record.

(Recess taken.)

THE VIDEOGRAPHER: Time is 2:37
p.m. and we are now back on the
record. You may proceed.

Q. Mr. Whaley, do you have a
computer of your own?

A. Yes.

Q. Do you have a smart phone?

A. Yes, I do.

Q. Do you have your own personal
e-mail accounts?

1 WHALEY

2 A. Yes.

3 Q. In trying to respond to our
4 request for documents, did you search through
5 your computer to see if there was anything
6 that would be responsive?

7 A. I'm not understanding the
8 question you are asking.

9 Q. You have a computer?

10 A. Yes, I do.

11 Q. That computer has files on it?

12 A. Yes.

13 Q. It has e-mail on it?

14 A. Yes.

15 Q. Did you look through the files
16 on that computer to see if you had anything
17 there that would be responsive to Exhibit 2,
18 the document production request?

19 A. I don't have any files on that.

20 Q. I beg your pardon?

21 A. I don't have files.

22 Q. I asked you a different
23 question. It was meant to be efficient and
24 not rude.

25 A. It's okay.

1 WHALEY

2 Q. My question was whether you
3 looked at your computer to see if you had any
4 documents or information stored there that
5 would be called for by Exhibit 2?

6 A. I didn't need to look because I
7 don't have anything on my computer.

8 Q. Does that mean you did not
9 look?

10 A. I did not look.

11 Q. What about on your smart phone,
12 did you look on your smart phone through
13 e-mail or other documents that might be
14 stored on your smart phone to see if you had
15 anything that was responsive to Exhibit 2?

16 A. I did not look. I don't have
17 any type of files or documents on my phone.

18 Q. So if six months or a year from
19 now someone were to ask you a question about
20 your claims in this case and you were to
21 testify differently from the way you
22 testified here today, do I understand that
23 you wouldn't have any documents or any other
24 information anywhere except that which you
25 have already given us that would refresh your

1 WHALEY

2 recollection about your employment at BBB and
3 these claims?

4 A. Yeah, yes.

5 Q. What did you do to prepare to
6 come here today to be a witness?

7 A. I really didn't do any
8 preparing.

9 Q. Did you look at any documents?

10 A. Just whatever documents I have.
11 I think I had some of these documents that
12 you have here, Exhibit 2, some of my
13 responses. That's just about it.

14 Q. Were you provided with
15 documents to review by anyone?

16 MS. LIU: Objection.

17 A. I don't understand the question
18 you're asking.

19 Q. You said that you may have
20 looked at some documents. Where did those
21 documents come from?

22 MS. LIU: Objection and direct
23 him not to answer. It's privileged
24 information.

25 Q. I think that the privilege

1 WHALEY

2 doesn't cover the fact that you may have
3 provided documents for the witness to review,
4 but let me see if I can do it this way
5 without getting into a fight about that.
6 When you say that you reviewed documents,
7 were those your own documents?

8 A. I'm not understanding the
9 question you're asking.

10 Q. I asked you if you recall what
11 you did to prepare to come here today and
12 then I asked you as a follow up whether you
13 looked at any documents and you told me that
14 you looked at some documents, Exhibit 2 I
15 think you may have mentioned, right and I'm
16 asking whether the documents that you looked
17 at were documents that you had in your
18 possession at that time?

19 A. Yes, I had documents in my
20 possession.

21 Q. Did you look at any documents
22 other than the documents that you had in your
23 possession at that time?

24 A. No.

25 Q. Did you speak to anyone else

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WHALEY

who's involved in this lawsuit before you
came here today?

A. No.

Q. Did you talk to any of the
other plaintiffs or opt in plaintiffs in this
lawsuit about the depositions they have
given?

A. No.

Q. Would you take a look at
paragraph 7 of your Declaration, please.

A. Yes, I'm looking at it.

Q. In that paragraph you say no
one from BBB ever either verbally or via
written document informed me that my salary
is to cover whatever hours I may work in a
workweek and that BBB would pay the salary
even if I work less hours than the full
number of hours scheduled. That's an
accurate reading of what you wrote there?

A. Yes.

Q. But that's not a true
statement, is it?

MS. LIU: Objection.

A. I don't understand what you

1 WHALEY

2 mean.

3 Q. Do you understand what truth
4 is?

5 A. I understand what truth is.

6 Q. That statement in paragraph 7
7 is not accurate, is it?

8 MS. LIU: Objection.

9 A. I don't understand what you
10 mean.

11 Q. Take a look at Exhibit 5.
12 Exhibit 5 is one of these.

13 A. I'm sorry. Yes.

14 Q. Under the asterisk, the
15 statement that I asked you to read earlier,
16 the first sentence is as a department manager
17 your base weekly salary is compensation for
18 all hours you have worked in the week
19 regardless of the number of hours you work so
20 BBB did tell you that your salary was to
21 cover whatever hours you may work in the
22 week, didn't it?

23 MS. LIU: Objection.

24 A. No, because I don't recall BBB
25 telling me that.

1 WHALEY

2 Q. You signed Exhibit 5, right?

3 A. Yes, I did.

4 Q. And you signed Exhibit 6,
5 correct?

6 A. Yes, I did.

7 Q. And Exhibit 6 has exactly the
8 same language after the asterisk as Exhibit
9 5, doesn't it?

10 A. Just give me one second.

11 Q. Please.

12 A. Yes, it does.

13 Q. Exhibit 7 you signed as well,
14 didn't you and take a look at Exhibit 9 as
15 well?

16 A. Yes, I'm looking at them.

17 Q. Each of these documents has
18 exactly the same sentence, don't they, as a
19 department manager your base weekly salary is
20 compensation for all hours you have worked in
21 the week regardless of hours you work of the
22 number of hours you work, correct?

23 A. It says that.

24 Q. BBB via a written document told
25 you not once but at least four times that you

1 WHALEY

2 would be paid for all hours you worked. Take
3 a look at Exhibit 3, please.

4 A. I have it.

5 Q. In the second paragraph of
6 Exhibit 3 and that's a document you signed
7 also, right?

8 A. I did.

9 Q. In the second paragraph it says
10 I understand that my weekly compensation
11 consists of two components, (1) a base weekly
12 salary for all hours worked and (2) an
13 additional amount for all hours over 40 that
14 I work during a week. The fact is that what
15 you wrote in paragraph 7 of your Declaration
16 is simply wrong; isn't that right?

17 MS. LIU: Objection.

18 A. No.

19 MR. SULDS: I don't have
20 anything further for the witness at
21 this time.

22 MS. LIU: I'm going to have a
23 few redirect.

24 EXAMINATION BY

25 MS. LIU:

1 WHALEY

2 Q. Mr. Whaley, did I pronounce
3 your name right?

4 A. Whaley.

5 Q. I'm just going to have a few
6 follow up questions. Can you tell us again
7 how do you come to apply a position at Bed
8 Bath?

9 MR. SULDS: Objection.

10 A. Yes, a friend of mine Jose told
11 me about the job at Bed Bath and Beyond. He
12 told me I had to go to the customer service
13 area in the store and fill out an
14 application.

15 Q. Is the application form that
16 you filled out, do you recall if the
17 application form yourself indicate what
18 position that you would be applying for?

19 MR. SULDS: Objection.

20 A. No.

21 Q. Did it indicate how much
22 compensation you would be compensated for the
23 position?

24 MR. SULDS: Objection.

25 A. No.

1 WHALEY

2 Q. Did it mention anything about
3 your work hours that you would anticipate to
4 work for that position?

5 MR. SULDS: Objection.

6 A. No.

7 Q. How many interviews that you
8 went through before you got hired by Bed Bath
9 and Beyond?

10 MR. SULDS: Objection.

11 A. I went through three.

12 Q. At the first interview, who did
13 you interview with the first time?

14 MR. SULDS: Objection.

15 A. Francis McKinley.

16 Q. Did Ms. McKinley mention
17 anything about your compensation at your
18 interview?

19 MR. SULDS: Objection.

20 A. No.

21 Q. Did she mention anything about
22 your work hours at the interview?

23 MR. SULDS: Objection.

24 A. No.

25 Q. Did she mention what position

1 WHALEY

2 you were applying for?

3 MR. SULDS: Objection.

4 A. No.

5 Q. Who did you interview with for
6 the second interview?

7 MR. SULDS: Objection.

8 A. Store manager Dennis at 565.

9 Q. Did Dennis tell you how many
10 hours you anticipate to work in what
11 position?

12 MR. SULDS: Objection.

13 A. No.

14 Q. Did he discuss the compensation
15 that Bed Bath will offer you?

16 MR. SULDS: Objection.

17 A. No.

18 Q. Did you guys talk about
19 anything about compensation and work hours at
20 the second interview?

21 MR. SULDS: Objection.

22 A. No.

23 Q. Third interview, who did you
24 interview with?

25 MR. SULDS: Objection.

1 WHALEY

2 A. Kevin, the district manager.

3 Q. Did Kevin the district manager,
4 did he mention about how many hours you
5 should anticipate to work for the position?

6 MR. SULDS: Objection.

7 A. No.

8 Q. How about compensation, did he
9 discuss anything about compensation with you?

10 A. No.

11 MR. SULDS: Objection.

12 Q. Who made you the job offer?

13 MR. SULDS: Objection.

14 A. Francis McKinley.

15 Q. Was that after the third
16 interview?

17 MR. SULDS: Objection.

18 A. That was after the third
19 interview, yes.

20 Q. When Ms. McKinley made you the
21 job offer, did she tell you how much you
22 would be paid?

23 MR. SULDS: Objection.

24 A. She gave me a salary.

25 Q. How much was that salary?

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WHALEY

MR. SULDS: Objection.

A. I believe it was 63,000 at the time.

Q. So through the application and through the three interviews no one mentioned to you about your compensation; is that right?

MR. SULDS: Objection.

A. No.

Q. No one from Bed Bath mentioned about how many hours you should anticipate to work; is that right?

MR. SULDS: Objection.

A. Correct.

Q. Did you understand why no one mention any of those things to you?

MR. SULDS: Objection.

A. No.

Q. After your conversation with Ms. McKinley where -- scratch that. Ms. McKinley who was the one who made you the job offer, right?

MR. SULDS: Objection.

A. Yes, she was.

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WHALEY

Q. At the time that you accept the job offer, what was your understanding about your pay and work hours?

MR. SULDS: Objection.

A. We have to do 47.5 hours. Anything after the 40 hours we would be paid overtime.

Q. How much was overtime would be?

MR. SULDS: Objection.

A. 1.5. I don't have the dollar amount because I can't recall the rate that she gave me.

Q. That was communicated to you?

MR. SULDS: Objection.

A. Yes.

Q. That was your understanding about your pay?

A. Yes.

MR. SULDS: Objection.

Q. Based on that understanding you accept the job offer?

MR. SULDS: Objection.

A. Yes, I did.

Q. Earlier you testified you went

1 WHALEY

2 through orientation before you start working;
3 is that correct?

4 MR. SULDS: Objection.

5 A. That's correct.

6 Q. Did you sign anything during
7 orientation?

8 MR. SULDS: Objection.

9 A. Yes, we signed new hire
10 paperwork.

11 Q. Do you recall exactly what
12 consist of the new hire paperwork?

13 MR. SULDS: Objection.

14 A. I don't recall exactly what
15 consisted of it. It was a while ago.

16 Q. Let's look at Exhibit 3.

17 A. Yes, I have it.

18 Q. Do you recall signing that
19 document at orientation?

20 MR. SULDS: Objection.

21 A. I recall signing the document.
22 I mean it has a date of July 18th of 2011,
23 but I can't recall if it was part of the
24 orientation or not.

25 Q. Exhibit 4 earlier you testified

1 WHALEY

2 this was a calculation chart that you were
3 referring to in your declaration paragraph 9;
4 is that correct?

5 MR. SULDS: Objection.

6 A. Yes.

7 Q. Paragraph 9 you said let me
8 direct your attention to Exhibit 1,
9 Declaration, paragraph 9?

10 A. Yes.

11 Q. It says starting in the
12 paragraph a few months later after I start
13 working and then you go down all the way to
14 the fourth line, I think this time I was also
15 given a piece of paper with some sort of
16 calculation chart on it and earlier you
17 testify this is a chart you referred to
18 Exhibit 4; is that correct?

19 MR. SULDS: Objection.

20 A. Correct.

21 Q. Prior to the instance you
22 referred to in paragraph 9, did you ever see
23 Exhibit 4 before?

24 MR. SULDS: Objection.

25 A. No.

1 WHALEY

2 Q. After that incident that you
3 refer to in paragraph 9, did you ever see
4 this Exhibit 4 ever again?

5 MR. SULDS: Objection.

6 A. No.

7 Q. Let's see Exhibits 5, 6, 7, 8
8 and 9.

9 A. Yes, I have them.

10 Q. Exhibit 4, let's look at that
11 document for a minute, it's titled as
12 department manager's bi-weekly pay stub; is
13 that correct?

14 MR. SULDS: Objection.

15 A. That's correct.

16 Q. If you go to Exhibit 5 through
17 Exhibit 9, right, it refers you to the
18 section department manager and that paragraph
19 you read earlier, you refer to please refer
20 to the attached department manager's
21 bi-weekly pay stub for a detailed
22 explanation. Do you recall that you ever
23 received that?

24 MR. SULDS: Objection.

25 A. No.

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WHALEY

Q. Let's go back to Exhibit 3.
Sorry I'm jumping around.

A. It's okay, I got it here.

Q. Exhibit 3 has four paragraphs;
is that correct?

A. It does.

Q. How about the -- can you read
the third paragraph for us?

MR. SULDS: Objection.

A. Sure. I understand that my
base salary is compensation for all hours I
work in a week. I will be paid this base
salary for each week I work whether or not I
work 40 hours in that week subject to the
company's sick day and leave policies.

Q. Did anyone explain to you what
does that mean that subject to the company's
sick day and leave policies?

MR. SULDS: Objection.

A. No.

Q. Do you have any understanding
about that line?

MR. SULDS: Objection.

A. No.

1 WHALEY

2 Q. Okay. Throughout your time at
3 42, store 42 as department manager, the
4 number of hours you worked each week, did it
5 vary?

6 MR. SULDS: Objection.

7 A. Yes.

8 Q. How did it vary from week to
9 week?

10 MR. SULDS: Objection.

11 A. Our schedule is written as
12 47.5, but weekly we would probably do about
13 50, 51, somewhere down the line but no less
14 than like 50, 51, 52.

15 Q. Was it always around that
16 range?

17 MR. SULDS: Objection.

18 A. Yes, except for back to school
19 time period.

20 Q. How long does that back to
21 school season last?

22 MR. SULDS: Objection.

23 A. A week.

24 Q. So what was the hours that you
25 generally would work during that period?

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WHALEY

MR. SULDS: Objection.

A. During which period?

Q. Back to school?

MR. SULDS: Objection.

A. Back to school week is probably about two weeks, sorry about that, it's about two weeks, but during those periods you can work from the minimum would probably be 47.5, but the average would probably be about 55 hours because you are working six days.

Q. Let's look at Exhibit 8.

A. Yes.

Q. Earlier you testified about the signature on this document. Is the signature yours, associate signature, did you sign that?

MR. SULDS: Objection.

A. No.

Q. How about the date, did you date that?

MR. SULDS: Objection.

A. No.

Q. Do you have any guesses who might have put it in there?

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WHALEY

MR. SULDS: Objection.

A. I do not.

MR. SULDS: Can we go off the
record for a second.

(Discussion off the record.)

Q. Earlier you testified --
scratch that. During your time as department
manager in store 42, did you work with any
assistant managers there?

MR. SULDS: Objection.

A. Yes.

Q. How many of them do you recall
you worked with?

MR. SULDS: Objection.

A. All of them. Seven.

Q. About seven?

A. Yes.

Q. Earlier you testified Mr. Gayl
and Mr. August, I can't pronounce his last
name.

MR. SULDS: Objection.

Q. You identified them as your
boss?

MR. SULDS: Objection.

1 WHALEY

2 A. Yes.

3 Q. Do you think the store managers
4 are a boss?

5 MR. SULDS: Objection.

6 A. Yes.

7 Q. Do you think the district
8 managers are your boss as well?

9 MR. SULDS: Objection.

10 A. Yes.

11 Q. Why do you specifically think
12 Mr. Gayl and Mr. August were your boss?

13 MR. SULDS: Objection.

14 A. Yes.

15 Q. Why do you think they are your
16 boss?

17 MR. SULDS: Objection.

18 A. Because they are telling me --
19 they are working with me, but they are
20 telling me, you know, directions of what they
21 want done and, you know, we have to follow
22 those directions.

23 Q. Do you think -- who do you
24 think they get the directions from?

25 MR. SULDS: Objection.

1 WHALEY

2 A. Probably get the directions
3 from the store manager Kristin and the
4 district managers as well.

5 Q. Earlier you also testified
6 quite a few of the conversations that you had
7 allegedly had with Mr. Gayl?

8 A. Yes.

9 Q. Such as talking about
10 inventory?

11 A. Yes.

12 MR. SULDS: Objection.

13 Q. About associate availability?

14 A. Yes.

15 MR. SULDS: Objection.

16 Q. About a sense of urgency about
17 supply, about sign work, about sales will
18 drop sometimes and about over stock behind
19 wall art; is that correct?

20 MR. SULDS: Objection.

21 A. That's correct.

22 Q. Do you know if Bed Bath has
23 kept records of the conversations you had
24 with Mr. Gayl?

25 MR. SULDS: Objection.

1 WHALEY

2 A. I don't know.

3 Q. Do you personally keep a record
4 of those conversations?

5 MR. SULDS: Objection.

6 A. No, I do not.

7 Q. Let's look at Exhibit 11. On
8 the bottom there are two lines for manager's
9 name. Do you recognize who's the one who
10 sign on the left?

11 MR. SULDS: Objection.

12 A. To the left it's Lauren
13 Alvarez, excuse me, Ms. Lauren Alvarez.

14 Q. And who signed next to her?

15 MR. SULDS: Objection.

16 A. To the right would be August.
17 I can't pronounce the last name.

18 Q. That's a challenge. Do you
19 recall what Mr. August's role was in terms of
20 the disciplinary notice?

21 MR. SULDS: Objection.

22 A. He's my boss. He's an
23 assistant store manager.

24 Q. Did he participate in issuing
25 this disciplinary notice?

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WHALEY

MR. SULDS: Objection.

A. Yes, he did.

Q. How did he participate?

MR. SULDS: Objection.

A. To my understanding he was the one that wrote the disciplinary action.

Q. Did you know that he has to seek someone else's permission before he gave you?

MR. SULDS: Objection.

A. Of course he has to speak to his bosses about it.

Q. Who do you think is his boss?

MR. SULDS: Objection.

A. Store manager.

Q. On a daily basis, how did you work with the ASMs?

MR. SULDS: Objection.

A. They would help put up product as well. They would do the same things we did. Put up products sometimes, sometimes ring. Sometimes back stock as well, sweep carpets, help with customers, print signs out.

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WHALEY

Q. How often did they do those things with you?

MR. SULDS: Objection.

A. They work with you daily.

MS. LIU: I have no further questions.

MR. SULDS: We're done.

THE VIDEOGRAPHER: This concludes today's deposition of Andrae Whaley. The time is 3:05 p.m. on July 19, 2017. This is the end of card three. We are now off the record.

(Time noted: 3:05 p.m.)

A C K N O W L E D G M E N T

STATE OF)

:ss

COUNTY OF)

I, ANDRAE WHALEY, hereby certify that
I have read the transcript of my testimony
taken under oath in my deposition; that the
transcript is a true, complete and correct
record of my testimony, and that the answers
on the record as given by me are true and
correct.

ANDRAE WHALEY

Signed and subscribed to before me,
this day of , 2017.

Notary Public, State of _____

C E R T I F I C A T E

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, SHARI COHEN, a Notary Public
within and for the State of New York, do
hereby certify:

That ANDRAE WHALEY, the witness
whose deposition is hereinbefore set forth,
was duly sworn by me and that such deposition
is a true record of the testimony given by
such witness.

I further certify that I am not
related to any of the parties to this action
by blood or marriage; and that I am in no way
interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 24th day of July, 2017.



SHARI COHEN

1 *****ERRATA*****

2 **ELLEN GRAUER COURT REPORTING CO. LLC**
 126 East 56th Street, Fifth Floor
 3 **New York, New York 10022**
 212-750-6434
 4

5 **NAME OF CASE: THOMAS vs. BED BATH AND BEYOND**
 6 **DATE OF DEPOSITION: July 19, 2017**
 6 **NAME OF WITNESS: ANDRAE WHALEY**

7 **PAGE LINE FROM TO REASON**

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21	_____				

22 **Subscribed and sworn before me**

23 **this_____day of_____, 20__.**

24 _____

25 **(Notary Public) My Commission Expires:**

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EXHIBIT 2



051-0038

BED BATH & BEYOND INC.
PO BOX 3759
UNION, NJ 07083-3759
ATTN: PAYROLL DEPT

Period Beginning: 10/12/2014
Period Ending: 10/25/2014
Pay Date: 10/30/2014

Taxable Marital Status: Single
Exemptions/Allowances:
Federal: 3
NY: 3
New York Cit: 3

RADICA KUTWARU
3605 HOLLAND AVE
BRONX NY 10467

Social Security Number: XXX-XX-XXXX

Earnings	rate	hours	this period	year to date
Regular			2,040.74	44,361.28
Fluctuating O T			185.29	3,896.28
Week 1 Regula		47.98		
Week 2 Regula		49.80		
Retro Pay				64.35
Gross Pay			\$2,226.03	48,321.91

Other Benefits and Information	this period	total to date
Total Hours	97.78	

Important Notes

YOUR COMPANY'S PHONE NUMBER IS 908-688-0888

NOTE: Due to rounding in the calculations below, the figures below may vary slightly from the actual dollars paid.

Deductions	Statutory		
	Federal Income Tax	-228.18	3,653.60
	Social Security Tax	-138.01	2,903.46
	Medicare Tax	-32.28	679.04
	NY State Income Tax	-96.85	1,905.77
	New York Cit Income Tax	-60.41	1,192.91
	NY SUI/SDI Tax	-1.20	26.40
	Other		
	401K	-133.56*	2,899.31
	Net Pay	\$1,535.54	
	Net Check	\$1,535.54	

FLUCTUATING OVERTIME BREAKDOWN (FL-OT)

Week	Hours	Rate	Total
WK 1 HRS @ FL-OT	7.98	10.6333	84.8
WK 2 HRS @ FL-OT	9.80	10.2446	100.4

* Excluded from federal taxable wages.

Your federal taxable wages this period are
\$2,092.47

PO0133 RK

EXHIBIT 3



BED BATH & BEYOND INC.
PO BOX 3759
UNION, NJ 07083-3759
ATTN: PAYROLL DEPT

Period Beginning: 02/17/2014
Period Ending: 03/02/2014
Pay Date: 03/06/2014

Taxable Marital Status: Single
Exemptions/Allowances:
Federal: 0
NY: 0
New York Cit: 0

ELIZABETH PADILLA
131 LORRAINE STREET
APT.2D
BROOKLYN, NY 11231

Social Security Number: XXX-XX-XXXX

Earnings	rate	hours	this period	year to date
Regular			1,789.80	5,794.43
Fluctuating O T			141.30	433.76
Week 1 Regula		47.50		
Week 2 Regula		47.50		
Gross Pay			\$1,931.10	6,228.19

Your federal taxable wages this period are
\$1,747.80

Other Benefits and Information

	this period	total to date
Total Hours	95.00	

Deductions	Statutory	
	Federal Income Tax	-255.95
	Social Security Tax	-116.75
	Medicare Tax	-27.30
	NY State Income Tax	-82.06
	New York Cit Income Tax	-51.46
	NY SUI/SDI Tax	-1.20
	Other	
	Checking	-1,076.00
	Dental	-9.86*
	Medical	-63.26*
	401K	-135.18*
	401K Loan	-137.08
	Adjustment	
	Annual Phys Cr	+12.50*
	Prev Screen Cr	+12.50*
	Net Pay	\$0.00

Important Notes

YOUR COMPANY'S PHONE NUMBER IS 908-688-0888
NOTE: Due to rounding in the calculations below, the figures below may vary slightly from the actual dollars paid.

FLUCTUATING OVERTIME BREAKDOWN (FL-OT)

Week	Hours	Rate	Total
WK 1 HRS @ FL-OT	7.50	9.4199	70.6
WK 2 HRS @ FL-OT	7.50	9.4199	70.6

* Excluded from federal taxable wages

P00032EP

EXHIBIT 4

MASHEL LAW, L.L.C.

500 Campus Drive, Suite 303

Morganville, New Jersey 07751

(P): (732) 536-6161

(F): (732) 536-6165

(E): smashel@mashellaw.com

Attorneys for Plaintiffs Brent Carter,

Robert Haynes and Kenneth Cuoco

By: STEPHAN T. MASHEL, ESQUIRE

N.J. ID. No.: 031851986

BRENT CARTER, ROBERT HAYNES,
and **KENNETH CUOCO**, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

BED BATH & BEYOND, Inc.,
a New York Corporation

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

DOCKET NO: MID-L-6178-16

Civil Action

**THIRD AMENDED CLASS ACTION
COMPLAINT**

INTRODUCTION

1. This is a class action brought by Plaintiffs, Brent Carter (“Plaintiffs” or “Carter”), Robert Haynes (“Plaintiffs” or “Haynes”) and Kenneth Cuoco (“Plaintiffs” or “Cuoco”), on behalf of themselves and all similarly situated current and former employees who worked in stores located in New Jersey operated by Defendant Bed Bath & Beyond, Inc. (“BBB”) to recover for Defendant’s failure to pay overtime wages in violation of The New Jersey Wage and Hour Law N.J.S.A., 34:11-56.1 to -56.12 (“NJWHL”).

2. Plaintiffs, and those similarly situated, were subjected to Defendant BBB's policy and practice of failing to pay overtime at a rate of one and one-half times their regular rate for hours worked in excess of forty (40) hours during a workweek.

3. The proposed Class consists of all persons employed by Defendant BBB in New Jersey who worked as either a Department Manager ("DM") and/or as a Customer Service Representative ("CSR") and/or as an Assistant Store Manager ("ASM") at any time two years prior to the filing of this action throughout the entry of judgment who worked over 40 hours per week and were not paid overtime pay at a rate of one and one half times their regular rate for hours worked in excess of 40 hours during a workweek (hereinafter the proposed "Class").

4. Specifically, Plaintiffs complain that rather than Defendant BBB paying Plaintiffs and all other members of the proposed Class overtime pay at a rate of one and one-half times their regular rate for hours worked in excess of forty (40) hours during a workweek as is required by the NJWHL, BBB instead unlawfully paid the proposed Class members overtime pay based on a calculation which divided an employee's base weekly salary by all hours worked in the week divided by 2 multiplied by all hours worked over 40 in the week. Put differently, BBB used the following "Fluctuating OT" formula to improperly calculate the proposed Class members overtime pay:

$$\frac{\text{Base weekly salary}}{\text{All hours worked}} \div 2 \times \text{all hours worked over 40 in the week} = \text{additional pay}$$

5. Defendant BBB unlawfully applied the Fluctuating OT formula to avoid paying the DMs, CSRs and ASMs overtime compensation required under the NJWHL, to wit, overtime pay at a rate of one and one half times their regular rate for hours worked in excess of forty (40) hours during a work week.

6. To remedy their damages, Plaintiffs bring this action as a state class action pursuant to New Jersey Rule of Court R. 4:32-1 (Rule 32).

7. Plaintiffs contend that Defendant BBB's improper classification resulted in the failure to properly compensate its DMs, CSRs and ASMs overtime pay as required under the NJWHL.

8. Plaintiffs seeks a declaration that their rights, and the rights of other Class members, were violated, an award of unpaid wages, an award of liquidated and compensatory damages, and an award of attorneys' fees and costs to make them whole for damages suffered.

PARTIES

9. Plaintiff, Brent Carter, is an individual who resides in Union County, New Jersey. Plaintiff worked for the Defendant BBB as a Customer Service Representative and DM.

10. Plaintiff, Robert Haynes, is an individual who resides in Middlesex County, New Jersey. Plaintiff worked for the Defendant BBB in New Jersey as a ASM.

11. Plaintiff, Kenneth Cuoco, is an individual who resides in Sussex County, New Jersey. Plaintiff worked for the Defendant BBB in New Jersey as a DM.

12. Defendant, BBB, is a New York corporation with its principal executive offices located at 650 Liberty Avenue, Union, New Jersey 07083.

13. The following is believed to accurately describe Defendant BBB:

Bed Bath & Beyond Inc., incorporated on October 5, 1971, is a retailer, which operates under the names Bed Bath & Beyond (BBB), Christmas Tree Shops, Christmas Tree Shops and That! or and That! (collectively, CTS), Harmon or Harmon Face Values (collectively, Harmon), buybuy BABY (Baby) and World Market, Cost Plus World Market or Cost Plus (collectively, Cost Plus World Market). The Company operates in two segments: North American Retail and Institutional Sales.

The Company's customers can purchase products from the Company either in-store, online, with a mobile device or through a contact center. The Company also operates Linen Holdings, a provider of a range of textile products, amenities and other goods to institutional customers in the hospitality, cruise line, healthcare and other industries. Additionally, the Company is a partner in a joint venture, which operates approximately seven retail stores in Mexico under the name Bed Bath & Beyond.

The Company sells a range of domestics merchandise and home furnishings. Domestics merchandise includes categories, such as bed linens and related items, bath items and kitchen textiles. Home furnishings include categories, such as kitchen and tabletop items, fine tabletop, basic housewares, general home furnishings, consumables and juvenile products.

The Company operates approximately 1,530 stores plus its various Websites, other interactive platforms and distribution facilities. The Company's over 1,530 stores operate in approximately 50 states, the District of Columbia, Puerto Rico and Canada, including over 1,020 BBB stores, approximately 280 Cost Plus World Market stores, over 100 Baby stores, approximately 80 CTS stores and over 50 Harmon stores. The Company's stores range in size from approximately 5,000 to 100,000 square feet. The Company has distribution facilities, which ship merchandise to stores and customers, totaling approximately 6.1 million square feet consisting of over three owned and approximately 10 leased facilities. The Company has approximately 813,000 square feet within over 20 leased and owned facilities for procurement and corporate office functions. In addition, the Company has over seven locations, totaling approximately 14,000 square feet, which are utilized primarily for institutional sales related functions.¹

ALLEGATIONS AS TO BRENT CARTER

14. Defendant employs several different types of workers, including but not limited to Department Managers, Customer Service Representatives, Assistant Store Managers, Store Managers, and other corporate employees.

15. In or about December 2010 Plaintiff Carter was hired by Defendant BBB and was assigned to work in their Totowa, New Jersey store as a DM and worked there as a DM until in or about July 2011.

¹<http://www.reuters.com/finance/stocks/companyProfile?symbol=BBBY.O>

16. Thereafter, Plaintiff Carter worked as a DM in BBB's Watchung, New Jersey store from July 2011 through in or about July 2014.

17. Thereafter, Plaintiff Carter worked as a DM in BBB's Totowa, New Jersey store from July 2011 through in or about July 2014.

18. Thereafter, Plaintiff Carter worked as a DM and/or CSR in BBB's Bridgewater, New Jersey store from July 2014 through April 2015.

19. The job duties of a DM and CSR are substantially similar and include, but are not limited to unloading freight, stocking product, stocking merchandise, assisting customers, cashier services, clean, organize and fixing stock room, gift packaging, getting together orders for online pick up, packing, sorting and shipping damaged goods, going outside to shipping trailers and getting items to replenish the store with, mopping and sweeping the store floor, cleaning the bathroom, organizing the sales floor and ordering merchandise.

20. Plaintiff Carter's primary duties as a DM and/or CSR did not include: hiring, firing, managing or disciplining other employees.

21. Plaintiff Carter's duties as a DM and/or CSR did not differ substantially from the duties of normal hourly paid store employees, who also perform many of the responsibilities previously described.

22. Plaintiff Carter did not exercise a meaningful degree of independent discretion with respect to the exercise of his duties as a DM and/or CSR.

23. Consistent with Defendant's policy and pattern or practice, Plaintiff Carter regularly worked in excess of 40 hours per work week without being paid a legally required overtime rate of 1.5 times his regular rate of compensation for the hours he worked in excess of 40 hours per work week.

24. Defendant knew that the improper payment of overtime pay would financially injury

Plaintiff Carter and similarly situated employees and violate New Jersey state law.

25. Throughout his employment with Defendant BBB as a DM and CSR, Plaintiff Carter regularly worked in excess of 40 hours per week.

26. As a DM and/or CSR in Bridgewater, New Jersey from July 2014 until April 2015, Plaintiff was paid a base salary approximating \$65,000 per year.

27. As a DM and/or CSR, Defendant failed to pay Plaintiff Carter overtime pay at a rate of one and one-half times their regular rate for hours worked in excess of 40 hours during a workweek as required under New Jersey state law.

ALLEGATIONS AS TO ROBERT HAYNES

28. Plaintiff Haynes was hired by Defendant BBB in August 2013 as a DM and assigned to work in its Brick, New Jersey store there until August 2014.

29. Thereafter, Plaintiff Haynes worked for Defendant BBB as a DM in its Brick, New Jersey store from in or about August 2014 through in or January 2014.

30. Thereafter, Plaintiff Haynes worked for Defendant BBB as a DM in its Hamilton, New Jersey store from in or about January 2014 through in or about May 2014.

31. Thereafter, Plaintiff Haynes worked for Defendant BBB as a DM in its Bridgewater, New Jersey store from in or about May 2014 through in or about July 2014.

32. Thereafter, Plaintiff Haynes worked for Defendant BBB as a DM in its Watchung, New Jersey store from in or about July 2014 through in or about August 2014.

33. Thereafter, Plaintiff Haynes worked for Defendant BBB as a ASM in its Watchung, in August 2014 for approximately three (3) weeks.

34. Thereafter, Plaintiff Haynes worked for Defendant BBB as an ASM in its Bridgewater, New Jersey store from August 2014 through March 2016.

35. The tasks that Plaintiff Haynes performed as an ASM were substantially the same as the responsibilities of a DM or CSR with the addition that as an ASM Plaintiff Haynes had was able to approve merchandise orders, order supplies and open and close stores.

36. Despite the fact that his responsibilities as an ASM were substantially the same as a DM or CSR, Plaintiff Haynes was classified by BBB as an employee exempt from receiving overtime pay, and therefore, did not receive overtime compensation for the hours he worked in excess of 40.

37. Plaintiff Haynes' primary duties as ASM did not include: hiring, firing, managing or disciplining other employees.

38. Plaintiff Haynes' duties as ASM did not differ substantially from the duties of normal hourly paid store employees, who also perform many of the responsibilities previously described.

39. Plaintiff Haynes did not exercise a meaningful degree of independent discretion with respect to the exercise of his duties.

40. Consistent with Defendants policy and pattern of practice, Plaintiff Haynes regularly worked in excess of 40 hours per work week without being paid a premium overtime rate of 1.5 times of the respective regular rate of compensation for the hours he worked in excess of 40 per work week.

41. Defendant knew that the improper payment of overtime pay would financially injure Plaintiff Haynes and similarly situated employees and violated state and federal laws.

42. Throughout his employment with Defendant BBB as a DM, Plaintiff regularly worked in excess of 40 hours per week.

43. At the time Plaintiff Haynes worked as an ASM in BBB's Bridgewater, New Jersey store, he regularly worked in excess of forty (40) hours in a week.

44. At the time Plaintiff Haynes worked as an ASM in BBB's Bridgewater, New Jersey store, he was paid a base salary approximating \$69,700 per year.

45. As an ASM, Defendant failed to pay Plaintiff Haynes overtime pay at a rate of one and one-half times their regular rate for hours worked in excess of 40 hours during a workweek, as required under New Jersey state law.

ALLEGATIONS AS TO KENNETH CUOCO

46. Plaintiff Cuoco was hired by Defendant BBB in or about July 2011 as a DM and assigned to work in its Springfield, New Jersey store. Cuoco worked in the Springfield store from July 2011 until in or about January 2012.

47. Thereafter, Plaintiff Cuoco worked for Defendant BBB as a DM in its Newton, New Jersey store from in or about January 2012 through in or about March 2013.

48. Thereafter, Plaintiff Cuoco worked for Defendant BBB as a DM in its Butler, New Jersey store from in or about March 2013 through in or about September 2013.

49. Thereafter, Plaintiff Cuoco worked for Defendant BBB as a DM in its Bridgewater, New Jersey store from in or about June 2014 through in or about June 2015.

50. Thereafter, Plaintiff Cuoco worked for Defendant BBB as a DM in its Watchung, New Jersey store from in or about June 2015 through in or about June 2016.

51. Plaintiff Cuoco's primary duties as a DM did not include: hiring, firing, managing or disciplining other employees.

52. Plaintiff Cuoco's duties as a DM did not differ substantially from the duties of normal hourly paid store employees, who also perform many of the responsibilities previously described.

53. Plaintiff Cuoco did not exercise a meaningful degree of independent discretion with respect to the exercise of his duties as a DM.

54. Consistent with Defendants' policy and pattern or practice, Plaintiff Cuoco regularly worked in excess of 40 hours per work week without being paid a legally required overtime rate of 1.5

times his regular rate of compensation for the hours he worked in excess of 40 per work week.

55. Defendant knew that the improper payment of overtime pay would financially injure Plaintiff Cuoco and similarly situated employees and violate New Jersey state law.

56. Throughout his employment with Defendant BBB as a DM and CSR, Plaintiff regularly worked in excess of 40 hours per week.

57. As a DM in the Springfield, Newton, Butler, Bridgewater and Watchung stores, Plaintiff Cuoco was paid a base salary approximating \$63,000 per year.

58. As a DM, Defendant failed to pay Plaintiff Cuoco overtime pay at a rate of one and one-half times their regular rate for hours worked in excess of 40 hours during a workweek as required under New Jersey state law.

CLASS ACTION ALLEGATIONS

59. Plaintiffs bring this claim as a class action pursuant to Rule 32 of the New Jersey Rules of Court on behalf of a class, consisting of:

All persons who work or worked in New Jersey as Department Managers, Customer Service Representatives and/or Assistant Store Managers for Defendant BBB at any time prior to two years prior to the filing of this action through the entry of judgment of this action (the "New Jersey Rule 23 Class") who worked over 40 hours per week and were not paid overtime pay at a rate of one and one-half times their regular rate of hours worked in excess of 40 hours during a work week.

60. The persons in the New Jersey Rule 23 Class are so numerous that joinder of all members is impracticable. The exact number of the New Jersey Rule 23 Class members is unknown to Plaintiff at this time but there is believed to be over a hundred such persons. The identity of the New Jersey Rule 23 Class members is known to the Defendants and is contained in the employment records that the Defendants are required to create and maintain as a matter of state and federal law.

61. Plaintiffs' claims are typical of the claims of the other members of the New Jersey Rule 23 Class as plaintiff and all other members of the New Jersey Rule 23 Class sustained damages arising out of defendants' conduct in violation of the New Jersey State laws complained of herein. The New Jersey Rule 23 Class members work, or have worked, for the Defendants in New Jersey as department managers and were improperly classified as exempt employees and not paid overtime wages by the Defendants. They have sustained similar types of damages as a result of Defendants' failure to comply with the NJWHL and supporting regulations of the New Jersey Department of Labor and Workplace Development contained in the New Jersey Administrative Code (NJAC).

62. Plaintiffs will fairly and adequately protect the interests of the members of the New Jersey Rule 23 Class and has retained counsel competent and experienced in complex class action litigation.

63. Plaintiffs have no interests that are contrary to or in conflict with those of the other members of the New Jersey Rule 23 Class.

64. Plaintiffs know of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

65. Common questions of law and fact exist as to all members of the New Jersey Rule 23 Class and predominate over any questions affecting solely individual members. Among the questions of law and fact common to the New Jersey Rule 23 Class are:

- a. Whether the NJWHL and the supporting regulations were violated by Defendants' acts as alleged herein;
- b. Whether Defendant failed to pay overtime wages to Plaintiffs and other New Jersey Rule 23 Class members for time worked in excess of 40 hours in a workweek as required

by NJWHL, N.J.S.A., 34:11-56a4 and N.J.A.C.,
12:56-6.1-6.7

c. Whether the Defendants improperly classified Plaintiffs and other New Jersey Rule 23 Class members as employees exempt from the overtime pay requirements of the NJWHL and the NJAC; and

d. Whether Plaintiffs and the New Jersey Rule 23 Class have sustained damages and, if so, the proper measure of such damages

66. Defendants have acted or have refused to act on grounds generally applicable to the New Jersey Rule 23 Class, thereby making appropriate relief with respect to the New Jersey Rule 23 Class as a whole.

67. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since damages suffered by individual New Jersey Rule 23 Class members may be relatively small, the expense and burden of individual litigation makes it virtually impossible for Plaintiffs and New Jersey Rule 23 Class members to individually seek redress for the wrongful conduct alleged. Individual class members lack the financial resources to conduct a thorough examination of defendants' compensation practices to prosecute vigorously a lawsuit against the defendants to recover such damages. Class litigation is superior because it will obviate the need for unduly duplicative litigation.

COUNT ONE

**VIOLATION OF THE NEW JERSEY WAGE AND HOUR LAW
FAILURE TO PAY OVERTIME WAGES**

68. Plaintiffs re-allege and incorporate all previous paragraphs as if set forth at length herein.

69. Pursuant to the NJWHL, N.J.S.A., 34:11-56.1, *et seq.*, Plaintiffs and all putative Class members are entitled to compensation at their regular rate for all hours actually worked.

70. N.J.S.A., 34:11-56a4 provides in relevant part: “Every employer shall pay to each of his employees’ wages at a rate of not less than ...for 40 hours of working time in any week and **1 1/2 times such employee's regular hourly wage for each hour of working time in excess of 40 hours in any week, except this overtime rate shall not include any individual employed in a bona fide executive, administrative, or professional capacity...**”(emphasis added).

71. Defendant BBB misclassified the Plaintiffs and all similarly situated employees as exempt when in fact they were non-exempt. Neither Plaintiffs nor the putative Class members qualify for exemptions under NJWHL. Thus, they are not exempt.

72. By misclassifying the Plaintiffs and similarly situated employees as exempt from overtime, Defendant BBB unlawfully failed to pay Plaintiffs and the putative Class members for hours worked over forty (40) hours in a week for that respective period at a rate of 1 1/2 times such employee's regular hourly wage for each hour of working time in excess of 40 hours in any week.

73. Through the use of its Fluctuating OT formula Defendant BBB unlawfully failed to pay Plaintiffs and the putative Class members for hours worked over forty (40) hours in a week for that respective period at a rate of 1 1/2 times such employee's regular hourly wage for each hour of working time in excess of 40 hours in any week.

74. Defendant BBB's unlawful conduct has been widespread, repeated, and willful. Defendant knew or should have known that its policies and practices were unlawful and unfair.

75. As a result of Defendant's violations of the NJWHL, Plaintiffs and others similarly situated have suffered damages by being denied pay for all of their hours worked, by being denied overtime wages in accordance with the NJWHL in amounts to be determined at trial, and are entitled to recovery of such amounts, prejudgment and post judgment interest, reasonably attorneys' fees and costs pursuant to the NJWHL.

COUNT TWO

VIOLATION OF THE NEW JERSEY WAGE AND HOUR LAW FAILURE TO PAY MINIMUM WAGES

1. Plaintiffs re-allege and incorporate all previous paragraphs as if set forth at length herein.

2. N.J.S.A., 34:11-56a states: "It is declared to be the public policy of this State to establish a minimum wage level for workers in order to safeguard their health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being."

3. Effective January 1, 2014, the minimum wage rate in New Jersey was \$8.25 per hour.

4. Effective January 1, 2015, the minimum wage rate in New Jersey was \$8.38 per hour.

5. For 2016, the minimum wage rate in New Jersey remained at \$8.38 per hour.

6. Through the use of its Fluctuating OT formula Defendant BBB unlawfully failed to pay Plaintiffs and the putative Class members minimum wages for hours worked over forty (40) hours in a week

7. Defendant BBB's unlawful conduct has been widespread, repeated, and willful. Defendant knew or should have known that its policies and practices were unlawful and unfair.

8. As a result of Defendant's violations of the NJWHL, Plaintiffs and others similarly situated have suffered damages by being denied pay for all of their hours worked, by being denied overtime wages in accordance with the NJWHL in amounts to be determined at trial, and are entitled to recovery of such amounts, prejudgment and post judgment interest, reasonably attorneys' fees and costs pursuant to the NJWHL.

COUNT THREE

UNJUST ENRICHMENT

1. Plaintiff re-alleges and incorporates by reference the allegations contained in the preceding paragraphs of this complaint, as though fully set forth herein.

2. By misclassifying the Plaintiffs and similarly situated employees as exempt from overtime, Defendant BBB unlawfully failed to pay Plaintiffs and the putative Class members for hours worked over forty (40) hours in a week for that respective period at a rate of 1 1/2 times such employee's regular hourly wage for each hour of working time in excess of 40 hours in any week.

3. Through the use of its Fluctuating OT formula Defendant BBB unlawfully failed to pay Plaintiffs and the putative Class members for hours worked over forty (40) hours in a week for that respective period at a rate of 1 1/2 times such employee's regular hourly wage for each hour of working time in excess of 40 hours in any week.

4. Through the use of its Fluctuating OT formula Defendant BBB unlawfully failed to pay Plaintiffs and the putative Class members minimum wages for hours worked over forty (40) hours in a week

5. By failing to pay Plaintiffs and the putative Class members for hours worked over forty (40) hours in a week for that respective period at a rate of 1 1/2 times such employee's regular hourly wage for each hour of working time in excess of 40 hours in any week, BBB has been unjustly enriched at the expense of, and to the detriment of, Plaintiff and the Class.

6. By failing to pay Plaintiffs and the putative Class members minimum wages for hours worked over forty (40) hours in a week, BBB has been unjustly enriched at the expense of, and to the detriment of, Plaintiff and the Class.

7. It would be inequitable for BBB to be permitted to retain the unpaid wages it avoided paying to Plaintiff and the Class from its wrongful misclassification of Plaintiffs and the Class as exempt from overtime and/or through the use of its Fluctuating OT formula, overtime wages at a rate of 1 1/2 times such employee's regular hourly wage for each hour of working time in excess of 40 hours in any week. Therefore, BBB should be compelled to disgorge to the Plaintiff and the Class all amounts it retained and received as a result of its wrongful and inequitable practices.

8. It would be inequitable for BBB to be permitted to retain the unpaid wages it avoided paying to Plaintiff and the Class minimum wages for hours worked over forty (40) hours in a week. Therefore, BBB should be compelled to disgorge to the Plaintiff and the Class all amounts it retained and received as a result of its wrongful and inequitable practices.

COUNT FOUR

VIOLATION OF THE NEW JERSEY WAGE PAYMENT LAW

1. Plaintiff re-alleges and incorporates by reference the allegations contained in the preceding paragraphs of this complaint, as though fully set forth herein.

2. The New Jersey Wage Payment Law (WPL) requires an employer to pay its employees all wages due under the New Jersey Wage and Hour Law (NJWHL) at least twice during a calendar month. N.J.S.A. 34:11-4.2.

3. The WPL further states the following

It shall be unlawful for any employer to enter into or make any agreement with any employee for the payment of wages of any such employee otherwise than as provided in this act, except to pay wages at shorter intervals than as herein provided, or to pay wages in advance. Every agreement made in violation of this section shall be deemed to be null and void, and the penalties in this act provided may be enforced notwithstanding such agreement; and each and every employee with whom any agreement in violation of this section shall be made by any such employer, or the agent or agents thereof, shall have a right of civil action against any such employer for the full amount of his wages in any court of competent jurisdiction in this State.

N.J.S.A. 34:11-4.7.

4. BBB claims to have had an agreement or understanding, express or implied, whereby it was mutually understood that BBB would pay employees under a Fluctuating Workweek formula a fixed salary regardless of the number of hours worked, and they would receive a fifty percent (50%) overtime premium in addition to the fixed weekly salary for all hours worked in excess of 40 during a workweek.

4. By using its Fluctuating OT or FWW formula, Defendant BBB has violated the WPL by failing to pay Plaintiffs and the putative Class members for hours worked over forty (40) hours in a week for that respective period at a rate of 1 1/2 times such employee's regular hourly wage for each hour of working time in excess of 40 hours in any week.

5. As a result of BBB unlawful actions, the Plaintiffs and the putative Class members have been damaged.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs Brent Carter, Robert Haynes and Kenneth Cuoco hereby demand judgment be entered against Bed Bath & Beyond, Inc., under all of the Counts of the Complaint as follows:

- a. Certifying this case as a class action in accordance with New Jersey Rule of Court R. 4:23-1 (Rule 23) with respect to the WPL, NJWHL claims set forth above;
- b. Declaring that Defendant Bed Bath & Beyond, Inc. violated its obligations under the WPL and NJWHL and its attendant regulations as set forth above;
- c. Certifying this matter to proceed as a class action;
- d. Granting judgment in favor of Plaintiffs and against Defendant Bed Bath & Beyond, Inc. and awarding the lost overtime compensation calculated at the rate of one and one-half (1.5) of Plaintiffs' regular rate multiplied by all hours that Plaintiffs worked in excess of forty (40) hours per week for the past three years;

- e. Judgment for Plaintiffs and the New Jersey Rule 23 Class members for all statutory, compensatory, liquidated and consequential damages, or any other damages authorized by law or equity, sustained as a result of defendant's unlawful conduct, as well as prejudgment and post judgment interest;
- f. An award to Plaintiffs and the New Jersey Rule 23 Class for their reasonable attorneys' fees, costs, including expert fees, and expenses authorized by law;
- g. Awarding reasonably attorney fees and costs incurred by Plaintiff's in filing this action; and
- h. Such further relief as this court deems appropriate.

Date: March 07, 2017

MASHEL LAW, L.L.C.
Attorneys for Plaintiffs
Brent Carter, Robert Haynes
and Kenneth Cuoco

By: 

STEPHAN T. MASHEL, ESQUIRE

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues triable in this action.

DESIGNATED TRIAL ATTORNEY

Stephan T. Mashel, Esquire is hereby designated as Plaintiff's trial attorney.

CERTIFICATION

I hereby certify to the best of my personal knowledge that the matter in controversy is not the subject of any other action pending in any Court or of a pending arbitration proceeding, nor is any other action or arbitration contemplated, nor any other parties to be joined EXCEPT for the joinder of the true persons in interest whose names are identified herein as Defendants John Does 1-10 and XYZ Corporations 1-10.

Date: March 07, 2017

MASHEL LAW, L.L.C.
Attorneys for Plaintiffs
Brent Carter, Robert Haynes
and Kenneth Cuoco

By: 

STEPHAN T. MASHEL, ESQUIRE

NOTICE PROHIBITING SPOILIATION OF EVIDENCE

PLEASE TAKE NOTICE, a defendant's failure to prevent spoliation of evidence can result in severe sanctions being imposed by the Court. Furthermore, Defendants' obligations to preserve documents and things for discovery in this case arise in law and equity independent of any Order of court or notice from our office. Defendants are hereby placed on notice not to destroy, conceal or alter any paper or electronic files and other data generated by and/or stored on computers and storage media (e.g., hard drives, hard disks, floppy disks, backup tapes, email accounts), or any other electronic data maintained by the named Defendants, such as surveillance or voice mail, that may be construed in any manner as potentially discoverable information in this litigation.

**AS TO THE PRESERVATION OF
VIDEOS, SURVEILLANCE MATERIALS,
OUT-TAKES, PHOTOGRAPHS, ETC.:**

In accordance with the above request for the avoidance of spoliation of any evidence please be further guided by the following specific request for preservation.

- (a) All photographs, slides, videotapes, or audiotapes, transcripts, or memoranda thereof, and/or motion pictures, surveillance photographs/motion pictures, out-takes, tape recording, movies, visual, optical and/or audio and/or magnetic reproductions of descriptions of Plaintiffs purporting to depict Plaintiffs, Plaintiffs' activities, actions, speech, etc.
- (b) All photographs of the scene of the underlying occurrence.
- (c) The time records, records of amount of footage of film or videotape used; the type of equipment used to take, develop, and convert such film or videotape; the make and model of all equipment, lenses and range settings employed by Defendant(s) and/or Defendant('s)(s') photographers, investigators, and/or other used or associated in conjunction with the surveillance, tape recordings, etc., of Plaintiff and all memoranda pertaining thereto.

NOTE: If the Defendant(s) fails to preserve and/or otherwise disclose such surveillance materials (using the words generically), then Plaintiffs may:

- (1) Move at the trial to exclude all such surveillance and its by-products; and/or
- (2) Move to exclude/suppress all of Plaintiffs' deposition testimony relating to the improperly suppressed/undisclosed pre-deposition surveillance materials and its progeny; and/or

- (3) Seek other appropriate and equitable relief by reason of Defendant('s)(s') non-compliance.

Date: March 07, 2017

MASHEL LAW, L.L.C.
Attorneys for Plaintiffs
Brent Carter, Robert Haynes
and Kenneth Cuoco

By: 
STEPHAN T. MASHEL, ESQUIRE

MASHEL LAW, L.L.C.
500 Campus Drive, Suite 303
Morganville, New Jersey 07751
(P): (732) 536-6161
(F): (732) 536-6165
(E): smashel@mashellaw.com
Attorneys for Plaintiffs Brent Carter,
Robert Haynes and Kenneth Cuoco

FILED

MAR 03 2017

ARTHUR BERGMAN, J.S.C.

By: **STEPHAN T. MASHEL, ESQUIRE**
N.J. ID No.: 031851986

BRENT CARTER, ROBERT HAYNES,
and **KENNETH CUOCO**, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

BED BATH & BEYOND, Inc.,
a New York Corporation

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

DOCKET NO: MID-L-6178-16

Civil Action

#892

ORDER

THIS MOTION having come before the Court by Robert H. Bernstein, Esquire, of the law offices of Greenberg Traurig, LLP, attorneys for Defendant Bed Bath & Beyond, Inc., seeking a grant of Defendant's Motion to Dismiss Plaintiff's Second Amended Class Action Complaint pursuant to R. 4:6-2(e), and the Court having considered the papers presented, the argument of counsel, if any, and for good cause shown:

IT IS on this 3rd day of March, 2017,

ORDERED that Defendant's Motion to Dismiss Plaintiff's Second Amended Class Action Complaint without prejudice is hereby **DENIED**;

AND IT IS FURTHER ORDERED that Defendant's Motion to Stay this action pending the resolution of the action pending in the Southern District of New York, entitled Daniel Thomas, Rashaun F. Frazer, Andrae Whaley and Eleni Miglis, individually and on behalf of all other employees similarly situated v. Bed Bath and Beyond, Inc., Civ. A. No. 16-cv-8160-PAE is hereby **DENIED**;

AND IT IS FURTHER ORDERED that Plaintiffs Brent Carter, Robert Haynes and Kenneth Cuco are hereby granted leave pursuant to R. 4:9-1 to file with the Court a Third Amended Class Action Complaint and shall do so within 10 days of the date hereof;

AND IT IS FINALLY ORDERED that a copy of this Order shall be served upon all counsel of record within 7 days of entry thereof.



J.S.C.

ARTHUR BERGMAN, J.S.C.